

# **TRANSCRIPT OF RECORD**

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## **Supreme Court of the United States**

**OCTOBER TERM, 1948**

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**No. 128**

**THE FARMERS RESERVOIR AND IRRIGATION  
COMPANY, PETITIONER,**

*vs.*

**WILLIAM R. McCOMB, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION OF THE UNITED  
STATES DEPARTMENT OF LABOR**

**No. 196**

**WILLIAM R. McCOMB, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION OF THE UNITED  
STATES DEPARTMENT OF LABOR, PETITIONER,**

*vs.*

**THE FARMERS RESERVOIR AND IRRIGATION  
COMPANY**

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**ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE TENTH CIRCUIT**

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**PETITIONS FOR CERTIORARI FILED** { **JUNE 28, 1948.**  
**AUGUST 4, 1948.**

**CERTIORARI GRANTED OCTOBER 11, 1948.**

# TRANSCRIPT OF RECORD

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**United States Circuit Court of Appeals**

**TENTH CIRCUIT**

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**No. 3549**

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**WILLIAM R. McCOMB, Administrator of the Wage and  
and Hour Division of the United States Department  
of Labor, Appellant,**

**vs.**

**THE FARMERS RESERVOIR AND IRRIGATION COM-  
PANY, a corporation, Appellee.**

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLORADO**

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Pleas and proceedings in the United States Circuit Court of Appeals for the Tenth Circuit, at the November Term, 1947, of said Court, before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges.

On the 14th day of August, A. D. 1947, a transcript of the record, pursuant to a notice of appeal, filed in the District Court of the United States for the District of Colorado, was filed in the office of the clerk of the United States Circuit Court of Appeals for the Tenth Circuit, in a certain cause wherein William R. McComb, Administrator of the Wage and Hour Division of the United States Department of Labor, was appellant, and The Farmers Reservoir and Irrigation Company, a corporation, was appellee, which said transcript, as prepared and printed under the rules of the United States Circuit Court of Appeals for the Tenth Circuit, is in the words and figures following:

IN THE UNITED STATES CIRCUIT COURT OF  
APPEALS FOR THE TENTH CIRCUIT

No. 3549

WILLIAM R. McCOMB, Administrator of the Wage and  
Hour Division, United States Department of Labor,  
Appellant,

THE FARMERS RESERVOIR AND IRRIGATION COMPANY, Ap-  
pellee.

vs.

Statement of Points to Be Relied Upon by Appellant

Appellant, William R. McComb, states that the points  
on which he intends to rely on appeal, as required by Rule  
13 of the rules of this Court, are as follows:

I.

The District Court erred in denying the injunction  
prayed for in the complaint of plaintiff-appellant, and in  
dismissing his complaint, and in refusing to enjoin defend-  
ant-appellee from violating Sections 7, 11(c), 15(a) (2)  
and 15 (a) (5) of the Fair Labor Standards Act of 1938.

II.

The District Court erred in failing to find and to con-  
clude that the defendant-appellee is violating the provi-  
sions of the Fair Labor Standards Act of 1938 as charged  
in the complaint.

III.

The District Court erred in finding and concluding that  
all of the employees of defendant-appellee are employed  
in "agriculture" as that term is defined in the Fair Labor  
Standards Act of 1938, and therefore are exempt from the  
provisions of Sections 7 and 15(a) (2) of this Act.

## IV.

The District Court erred in finding and concluding that the clerical employee, Ermil E. Coler, of defendant-appellee is not engaged in commerce or in an occupation necessary to the production of goods for commerce as defined in the Fair Labor Standards Act of 1938, and that therefore this employee is not entitled to the benefits of Section 7 of this Act.

## V.

The District Court abused its discretion by failing and refusing to grant the injunction as prayed for on account of the failure of defendant-appellee to make, keep, and preserve records of wages, hours of work, and other conditions and practices of employment of its employees as prescribed by regulations of the plaintiff-appellant promulgated pursuant to the provisions of Section 11(c) of the Fair Labor Standards Act of 1938.

WILLIAM S. TYSON,  
Solicitor

BESSIE MARGOLIN,  
Assistant Solicitor

REID WILLIAMS,  
Regional Attorney,  
Attorneys for Appellant.

Filed August 28, 1947. Robert B. Cartwright, Clerk.

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IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF COLORADO

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Pleas and Proceedings before The Honorable J. Foster Symes, Judge of the United States District Court for the District of Colorado, presiding in the following entitled cause:

WILLIAM R. McCOMB, Administrator of the Wage and Hour Division of the United States Department of Labor, Plaintiff,

vs.

THE FARMERS RESERVOIR AND IRRIGATION COMPANY,  
Defendant.

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Complaint

I.

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15(a) (2) and 15(a) (5) of the Fair Labor Standards Act of 1938 (Act of June 25, 1938, c. 676, 52 Stat. 1060; U.S.C. Title 29, Sec. 201 et seq.) hereinafter called the Act.

II.

Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III.

Defendant is, and at all times hereinafter mentioned was, a corporation organized and existing by virtue of the laws of the State of Colorado, having its principal office, a place of business at 311 C. A. Johnson Building, in the City of Denver, State of Colorado, and reservoirs, canals, and ditches and other water distribution facilities within

divisions of the company's system known as Marshall Lake Division, Standley Lake Division, Westminster Lake Division, Barr Lake Division, and Milton Lake Division, all being located within the Counties of Arapahoe, Adams, Boulder, City and County of Denver, Jefferson, Weld, Gilpin, Grand and Park, State of Colorado, within the jurisdiction of this Court, and is, and at all times herein-

1 after mentioned was, engaged at such places of business in the operation, maintenance, and repair of the said water distribution facilities and in the management thereof; the water provided by the facilities and system aforesaid is used and utilized within the counties named in the irrigation and production of corn, winter wheat, spring wheat, oats, barley, potatoes, beans, sugar beets, rye and other commodities which are shipped and transported in interstate commerce.

#### IV.

At all times hereinafter mentioned, defendant employed and is employing approximately sixteen (16) employees in and about its places of business in the counties aforesaid within the State of Colorado in processes and occupations necessary to the production of corn, winter wheat, spring wheat, oats, barley, potatoes, beans, sugar beets, rye, and other commodities. Substantially all of the goods produced by these employees have been, and are being, produced for interstate commerce and have been, and are being shipped, delivered, transported, offered for transportation and sold in interstate commerce, or have been and are being shipped, delivered or sold with knowledge that shipment, delivery or sale thereof in interstate commerce is intended, from the State of Colorado to other states.

#### V.

Defendant repeatedly has violated and is violating the provisions of Sections 7 and 15(a) (2) of the Act by employing many of its employees in the production of goods for interstate commerce, as aforesaid, for workweeks longer than 44 hours during the year beginning October 24, 1938, for workweeks longer than 42 hours during the year

beginning October 24, 1939, and for workweeks longer than 40 hours since October 24, 1940, without compensating these employees for their employment in excess of 44, 42, and 40 hours, in workweeks during such respective periods, at rates not less than one and one-half times the regular rate at which they were employed.

## VI.

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11(c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

## VII.

Defendant, an employer subject to the provisions of the Act, repeatedly has violated and is violating the provisions of Sections 11(c) and 15 (a) (5) of the Act, in that since October 24, 1938, it has failed to make, keep, and preserve adequate and accurate records of its employees and the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the said regulations, in that the records kept by defendant failed to show adequately, among other things, the hours worked each workday and each workweek, the regular rate of pay, the basis upon which wages are paid, the total straight time earnings for each workweek, and the total weekly overtime excess compensation with respect to many of its employees.

## VIII.

Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove

alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment permanently enjoining and restraining defendant, its officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in its behalf and interest, from violating the provisions of Sections 3 15(a) (2) and 15(a) (5) of the Act, and such other and further relief as may be necessary and appropriate.

WILLIAM S. TYSON,  
Solicitor

REID WILLIAMS,  
Regional Attorney.

4 Filed May 13, 1946.

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### Answer

Comes now the defendant, The Farmers Reservoir and Irrigation Company, and for its answer to the complaint in the above-entitled action filed:

### For a First Defense

1. As to the allegations of Paragraph I, denies the implied allegations therein that this defendant and its employees are subject to said Fair Labor Standards Act of 1938, and that this defendant is violating the provisions of the sections of said Act in said paragraph referred to.

2. Admits the allegation of Paragraph II.

3. As to the allegations of Paragraph III: Admits that the defendant is, and at all times in the complaint mentioned was, a corporation organized under and existing by virtue of the laws of the State of Colorado, having its principal office and place of business at 311 C. A. Johnson Building, in the City of Denver, State of Colorado.

Alleges that the defendant is a mutual ditch company organized under special statutes of the State of Colorado



5 for the maintenance and operation of an irrigation system for the exclusive irrigation of farm lands owned by the stockholders of the defendant.

Admits that the title to certain reservoirs, canals and ditches and other water distribution facilities located in the counties of Adams, Boulder, Jefferson and Weld in the State of Colorado, within the jurisdiction of this Court, stands in the name of this defendant, but alleges that this defendant, as such mutual ditch company, holds said title in trust solely for its stockholders.

Admits that at the times in said paragraph mentioned defendant was and is engaged at such places in the operation, maintenance and repair of said reservoirs, canals, ditches and other water distribution facilities, and in the management thereof, but alleges that this defendant carries on said activities solely in behalf of and as trustee for its stockholders.

Admits that the water provided by said facilities and system is used and utilized within the counties of Adams, Jefferson, Boulder and Weld, State of Colorado, in the irrigation and production of corn, winter wheat, spring wheat, oats, barley, potatoes, beans, sugar beets, rye, and other agricultural commodities.

Denies each and every other allegation in said Paragraph III.

4. As to the allegations of Paragraph IV, admits that at the times therein mentioned this defendant employed, and is now employing, in excess of sixteen (16) employees in and about its irrigation system in counties within the State of Colorado in occupations necessary to the production of corn, winter wheat, spring wheat, oats, barley, potatoes, beans, sugar beets, rye and other agricultural commodities; denies each and every other allegation in said paragraph IV contained.

5. Denies each and every allegation in Paragraph V.

6. Admits the allegations of Paragraph VI.

6 7. Denies each and every allegation in Paragraph VII.



## 8. Denies each and every allegation in Paragraph VIII.

### For a Second Defense

For a further and second defense the defendant alleges and shows as follows:

1. That it is a non-profit mutual ditch company organized and existing under and by virtue of the laws of the State of Colorado for the sole purpose of maintaining and operating a system of irrigation canals and reservoirs for the purpose of diverting water from the public streams of Colorado and transporting such water through said canals and impounding same in said reservoirs and distributing same from said canals and reservoirs to the individual stockholders of the defendant for the cultivation and tillage of the soil of the farms owned by said individual stockholders, and the production, cultivation, growing and harvesting of agricultural crops thereon, such as alleged in the complaint.

Pursuant to the constitution and statutes of the State of Colorado decrees have been entered by courts of the State of Colorado having jurisdiction of such matters, adjudicating to the various ditches and reservoirs, the record title to which stands in the name of this defendant, the right to divert from the public streams in the State of Colorado through and by means of said canals and reservoirs certain quantities of water as of various priority dates for use in irrigating lands lying under and susceptible to irrigation from said ditches and reservoirs, which lands are owned by the stockholders of the defendant.

Said water rights and the water diverted thereon are owned by the stockholders of this defendant. The proportionate ownership of the various stockholders of the defendant in said water rights is evidenced by stock issued by this defendant to its stockholders, which stock entitles each share of stock to a pro rata share of the water available for distribution to the stockholders in the Division of the defendant's system to which such stock is allocated.

Defendant is organized and exists solely for the purpose of maintaining and operating said irrigation system for,

7 in behalf of and as trustee for its stockholders only. Defendant does not sell water to anyone and does not carry water for hire.

The stockholders of defendant annually levy an assessment upon their stock in an amount sufficient to defray the expense necessary to maintain and operate said canals and reservoirs and to pay principal and interest on defendant's outstanding bonds and other corporate purposes. Said assessments are the only source of income of defendant. It does not operate for profit, but is a non-profit corporation and has not and cannot declare dividends.

Said water rights so decreed to the ditches and reservoirs of the defendant and said ditches and reservoirs are appurtenant to and constitute a part of the lands owned by the defendant's stockholders on which the waters carried through said ditches and reservoirs are used for irrigation purposes. Said ditches and reservoirs, under the constitution and laws of the State of Colorado, are not separately taxed, but the value thereof is included in the valuation for tax purposes placed upon the lands of the defendant's stockholders on which said waters are so used for irrigation purposes.

Irrigation of the lands of the stockholders of this defendant is a branch of the agriculture and farming business by them conducted and is a necessary practice and an incident to and in conjunction with their farming operations and is absolutely essential to the cultivation and tillage of the soil of said stockholders' farms and to the production, cultivation, growing and harvesting of said agricultural crops thereon, and without the application and use of said water on said farms such cultivation and tillage of the soil thereof and such production, cultivation, growing and harvesting of such agricultural crops and commodities would not be possible.

The maintenance and operation of the irrigation ditches and reservoirs by this defendant, as such mutual ditch company, for and in behalf of its stockholders, and the work of said employees is absolutely essential to the securing of such irrigation water and the transporta-

8 tion thereof from the public streams to the farms of the individual stockholders of the defendant.

All employees of the defendant have been and are exclusively engaged and employed in work which consists of securing said irrigation water from the public streams, transporting it through the irrigation canals, impounding it in the reservoirs and distributing it from the distribution canals to the individual laterals of the different stockholders and in maintaining and operating said irrigation system of canals and reservoirs for the aforesaid purpose.

All of the so-called employees of the defendant are, in truth and in fact, through and by reason of the agency of the defendant for its stockholders, for all intents and purposes, employees of the farmer stockholders of the defendant, and are engaged and employed in the irrigation and production, and, as alleged in the complaint herein, in practices and occupations necessary to the production of corn, winter wheat, spring wheat, oats, barley, potatoes, beans, sugar beets, rye, and other agricultural and horticultural crops and commodities for the farmer stockholders of the defendant, who collectively pay them for their work, through the agency of the defendant.

2. Defendant alleges and shows that by reason of the above, all of the employees of the defendant are employed in agriculture or in executive and administrative capacities in connection with the maintenance and operation of said irrigation system and are exempted from the provisions of Sections 3 and 4 (Title 29, U.S.C., 206 and 207) of said Fair Labor Standards Act of 1938 by Section 13 thereof, 52 Stat. 1067, as amended by the Act of August 9, 1939, 53 Stat. 1266, Title 29, U.S.C., Sec. 213.

Wherefore, having fully answered, defendant prays that the complaint in this action filed be dismissed.

Dated this 8th day of July, 1946.

BANCROFT, BLOOD & LAWS,  
FRANK N. BANCROFT,  
BROCK, AKOET, CAMPBELL & MYER

JOHN P. AKOLT  
R. A. DICK  
JOHN P. AKOLT, JR.  
Attorneys for Defendant.

10

Filed July 8, 1946.

### Stipulation and Agreement as to Certain Facts

It is hereby stipulated and agreed by and between L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, Plaintiff, and The Farmers Reservoir and Irrigation Company, a corporation, Defendant, through their undersigned attorneys of record herein, that the facts hereinafter set forth are true, and that this stipulation may be offered and received in evidence at the trial of the above-entitled cause by either or both of the parties hereto as to any or all of the facts hereinafter stated, with the right of either party hereto, however, to introduce other and additional evidence not inconsistent herewith and to object to the introduction of any portions of this stipulation in evidence on the ground that such facts are irrelevant, immaterial or incompetent to prove any issue in this case:

1. Defendant is, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Colorado, with its principal office and place of business at 311 C. A. Johnson Building in the City and County of Denver, State of Colorado.

11 2. Attached hereto and marked "Exhibit 1" is a copy of defendant's Articles of Incorporation, as amended. Attached hereto and marked "Exhibit 1A" is a copy of the defendant's By-Laws as amended.

3. Defendant is a nonprofit corporation and is a mutual ditch company organized and existing under particular statutes of the State of Colorado relating to such corporations for the sole purpose of owning, maintaining and operating a system of irrigation canals and reservoirs for the purpose of diverting water from the public



streams of Colorado and transporting such water through said canals and impounding same in said reservoirs and distributing same from said canals and reservoirs to the individual stockholders of the defendant, or their nominees, for the irrigation of the farm lands under said irrigation system of defendant.

4. Defendant has 10,500 shares of authorized capital stock. Each share of such capital stock entitles the owner thereof to an equal and pro rata share with every other share of the property of the defendant and of the available water supply in the division of the defendant's irrigation system to which such stock is allocated and to the delivery of such water into the individual farmer's lateral in accordance with the defendant's By-Laws and operating practices, and is also subject to an equal and pro rata assessment with every other share of stock for the expenses of the defendant as hereinafter more clearly outlined.

5. The defendant's irrigation system was planned and conceived as a complete and new project by the owners of dry grazing or unproductive lands in the Counties of Adams, Boulder, Jefferson and Weld, in the State of Colorado, who wished to convert such lands into irrigated farm lands; and in order to accomplish this purpose, these owners of said grazing or unproductive lands organized and incorporated the defendant company under the laws of the State of Colorado as a mutual ditch company, which defendant mutual ditch company borrowed money, planned, surveyed, and constructed the irrigation system of the defendant, and which system consists of four (4) large and a number of small water storage reservoirs and about three hundred (300) to four hundred (400) miles of canals located in the Counties of Adams, Boulder, Jefferson and Weld, in the State of Colorado, necessarily built for the running and storage of water to irrigate lands of its stockholders. Attached hereto and marked "Exhibit 2" is a map showing the location of the reservoirs and canals constituting the defendant's irrigation system. Certain of these canals have their headgates on South Platte River, Clear Creek, Boulder Creek or other public streams in the State of Colorado



through which water for irrigation purposes is diverted from such streams and carried directly through such canals of defendant and distributed therefrom into the farmers' lateral ditches extending from their farms to such canals of defendant. Certain of these canals of defendant are known as reservoir intake canals through which waters are diverted from said streams and carried there through and impounded in defendant's reservoirs at the ends of said intake canals, which waters are subsequently diverted from said reservoirs through distributing canals of defendant extending therefrom, from which distributing canals of defendant and through headgates therein such waters are delivered to the farmers into the farmers' lateral ditches extending from their farms to such distributing canals of defendant.

6. The record title to the lands upon which defendant's canals and reservoirs are located stands in the name of the defendant. Said title consists in part of a full fee title, in part of a fee title so long as the land is used for canal or reservoir purposes, in part of deeded easements, and in part of prescriptive right title.

13 7. Pursuant to the constitution and statutes of the State of Colorado decrees have been entered by courts of the State of Colorado having jurisdiction of such matters adjudicating to said canals and reservoirs of defendant, the record title to which stands in the name of the defendant, the right to divert from the public streams in the State of Colorado through and by means of said canals and to store in said reservoirs certain quantities of water as of various priority dates for use in irrigating lands lying under and susceptible to irrigation from said canals and reservoirs. Under such decrees all of said waters can be diverted and used and are diverted and used only for irrigation purposes by defendant's stockholders or their nominees in growing agricultural crops. Water delivered by and through the defendant's irrigation system can be and is delivered only to its stockholders or their nominees. Attached hereto and marked "Exhibit 3" and "Exhibit 3A", respectively, are specimen copies of such water decrees, which copies are illustrative of and typical of the numerous decrees granted to the canals and

reservoirs of the defendant. "Exhibit 3" is a decree for so-called direct irrigation water, and "Exhibit 3A" is a decree for so-called storage or reservoir water.

8. Defendant's stockholders, for the most part, are farmers in the Counties of Adams, Boulder, Jefferson and Weld, in the State of Colorado. There are approximately one hundred thousand (100,000) acres of farm land which are irrigated, in whole or in part, by the water hereinabove mentioned carried through defendant's irrigation system, in a manner and under practices commonly used by farmers who raise agricultural crops under defendant's irrigation system.

9. In some instances an irrigation canal in the defendant's irrigation system for a part of its length is owned (exclusive of the water carried therein) jointly by the defendant and by other irrigation company or companies.

14 In such instances the cost or expense of carrying such water is paid by some mutual agreement between the defendant and such other irrigation company or companies.

10. The major portion of the water distributed through the defendant's irrigation system is so-called storage water which is diverted from the public streams and run into the defendant's reservoirs during the non-irrigation season and run out of the reservoirs through defendant's distributing canals and delivered to the laterals of the individual farmers during the irrigation season. In addition to this storage water, there is diverted from the public streams and run through the defendant's canals and delivered to the laterals of the individual farmers such direct irrigation water as is available from time to time.

Usually in the month of May of each year on, or in any event, prior to the time distribution of storage water is started for irrigation, the Board of Directors of the defendant estimates from the then available supply the amount of storage water which can be distributed on each share of stock in the several divisions of the company's system during the then current irrigation season; and notice of the said estimate is sent to each stockholder of the defendant. In the event of any later increased supply of

storage water over and above the amount of such estimate, revisions of such estimate are from time to time made and notice thereof sent to the stockholders. Thus, during the irrigation season, the individual farmer will have available to him water from two (2) sources—(1) so-called direct irrigation water in variable pro rata amounts and (2) his estimated pro rata share of such storage water. During the irrigation season, the individual farmer contacts the defendant's employee ditch rider, or otherwise makes known to the defendant company, the amount of water which he desires delivered to him from his allocated portion of such estimated amount of storage water.

15 From day to day these demands for water by the individual farmers are received by the defendant through its ditch rider, lake tender, superintendent or Denver office; and, thereafter, insofar as water is available to meet such demands from day to day, such water is turned out of the defendant's storage reservoirs and run through the defendant's distributing canals by the defendant's ditch riders and turned out of the defendant's canals by defendant's ditch riders through diversion headgates therein into the farmer's individual lateral. An account is set up in the Denver office of the defendant with each stockholder who is credited with the estimated pro rata amount of storage water to which he will be entitled during the current irrigation season, and a charge is made against the account of each stockholder for each withdrawal of water. When direct irrigation water is available, it is, when demanded, run and distributed to the farmers upon a pro rata stock-ownership basis by the above-mentioned employees of the defendant.

None of the defendant's employees have anything to do with the application or use of the water after the same is turned out of the defendant's canals into the individual laterals of the farmers.

11. Defendant does not sell water to anyone and does not carry water for hire.

2. Under the laws of the State of Colorado and practices arising thereunder, agricultural lands for taxation

purposes are classified, among other classifications, into such classifications as irrigated farm lands, non-irrigated farm lands, grazing lands, and other classification not material here. Irrigated farm lands are valued at a higher rate for taxation purposes, since such lands by reason of their having water for irrigation are deemed more valuable than non-irrigated lands. Under the constitution and statutes of the State of Colorado there are no real or personal property taxes separately assessed against the shares of stock of the defendant, or the water represented thereby, or against the canals and reservoirs or other properties constituting the irrigation system of the defendant, since it is deemed that for taxation purposes the value represented by said irrigation system and  
16 by the irrigation water available to such shares of stock is taxed by increasing the tax assessment value placed upon the lands classified as irrigated farm lands upon which such water is used.

(Plaintiff Administrator objects to the introduction in evidence of the facts set forth in this paragraph on the grounds that such facts are not relevant, material or competent to any issue in this case.)

13. Each year at the annual stockholders' meeting the stockholders of the defendant levy an annual assessment upon the outstanding stock of the defendant for the purpose of raising money necessary during the succeeding fiscal year to defray expenses incident to the maintenance and operation of the defendant's irrigation system and the payment of principal and interest on defendant's outstanding bonds, and other incidental corporate expenses. The payment of such assessments by each stockholder is a condition precedent to such stockholder's right to receive water on his stock. This is the sole source of income of defendant, with the exception of some incidental income from lease rentals for duck hunting and similar purposes on some of its reservoirs, the receipt of which operates to reduce the amount of the annual assessment made upon the stock, and except for certain reimbursement expense income received from other irrigation companies where there is a joint ownership of an irrigation canal operated by the defendant. The defendant also owns some stock in



other irrigation companies from which it secures part of the water available to its stockholders and pays some expenses to other companies for water secured from them. Attached hereto is an annual statement marked "Exhibit 4" of the defendant furnished by the management to its stockholders for the year ending August 31, 1946, which statement is representative of the normal and ordinary financial operations of the defendant.

17 14. The defendant, as a mutual ditch company, has not and cannot make a profit, and has not paid and cannot pay any dividends.

15. The farm lands irrigated by water so distributed by defendant through its irrigation system are highly productive, and such high degree of productivity results in a substantial degree from the irrigation thereof by the use of such waters by the individual farmers under the usual practices of all the farmers producing agricultural crops under defendant's irrigation system. On these irrigated farm lands there are planted, grown and produced in large quantities a wide variety of agricultural crops, such as sugar beets, wheat, corn and other grains, potatoes, peas, beans and other crops; and such irrigation water is necessary to and is used for the growth and production of such crops. If such irrigation water were not available and used on such land, it would cease to be irrigated farm land; and it would become non-irrigated farm land, grazing land or other class of land.

16. The water collected, run and delivered by the defendant through the labor of certain of its employees to the individual farmers under the defendant's irrigation system, in manner as elsewhere explained in this stipulation is used by the individual farmers on their farm lands for irrigation purposes in connection with the tillage of the soil and the production, cultivation, growing and harvesting of the aforementioned agricultural crops. The distribution and delivery of such water by the defendant to the individual farmers into the farmer's individual lateral has been and is being made substantially in the manner provided for in defendant's By-Laws. The defendant has exercised control over the diversion headgates or weirs



on or along its canals, through which diversion headgates or weirs water is diverted to the individual farmers for their use in irrigation substantially in the manner as specified in the By-Laws.

17. Sugar beets are grown on said lands with the use of said water in substantial quantities. Such sugar beets are suitable and are purchased and used only for processing into refined sugar by several sugar beet factories

18 of the Great Western Sugar Company located in the Cities of Brighton, Fort Lupton, Greeley, Longmont, and other points in the State of Colorado; and a substantial part of the refined sugar processed from those sugar beets is sold, shipped and delivered annually by said sugar company to states other than the State of Colorado. It is well known and understood by defendant and by the farmers producing such sugar beets that such sugar beets will be used and consumed in the process of making refined sugar, a substantial part of which is to be sold and shipped by said sugar company in interstate commerce.

18. Substantial quantities of corn, peas and beans, which are produced by certain farmers on their said irrigated lands with the use of said water, are sold by said farmers to numerous and diverse vegetable canning plants and factories located in the Counties of Adams, Jefferson, Boulder and Weld, in the State of Colorado, and by said canning plants and factories are processed, canned, shipped and sold in substantial quantities by said canning factories in interstate commerce to states other than the State of Colorado. The defendant and said farmers on whose irrigated lands said crops are produced know and have reason to believe that substantial quantities thereof will be so processed and then sold and shipped in interstate commerce to points other than the State of Colorado by said canning factories or plants.

19. Wheat raised by said farmers on said farm lands with the use of said water is by said farmers sold to grain elevators or to flour mills located in the State of Colorado. The flour produced from said wheat sold to said flour mills is shipped by said flour mills in substantial quantities in interstate commerce to points outside the State of Colo-

rado. The defendant and the farmers on whose irrigated lands such wheat is produced know and have reason to believe that substantial parts thereof so processed into flour will be sold and shipped by said flour mills in interstate commerce to points outside the State of Colorado.

19 20. The defendant and the farmers on whose irrigated land the aforesaid crops are produced know and have reason to believe that substantial quantities of crops grown thereon which are not processed in the State of Colorado will be shipped and sold regularly in interstate commerce to points outside the State of Colorado by persons other than the defendant or the individual farmers.

21. The defendant has three (3) classes of employees: (1) employees in the Denver office of the company; (2) lake or reservoir tenders and (3) ditch riders. It also owns and operates, in connection with the maintenance and repair of its canals and reservoirs, a drag line and employs a man to operate such drag line. On occasions it employs a number of common laborers for special maintenance work.

22. The said lake or reservoir tenders perform maintenance work upon the defendant's storage reservoirs and also operate the intakes and outlets of such reservoirs, and during the irrigation season, release from storage such water as is available to fill the current requirements of the farmers who are entitled to the water. In most instances the lake or reservoir tender is also a ditch rider and has charge of the maintenance of a section of the ditch below the lake and the delivery of the water therefrom to the farmers.

23. The ditch riders, from day to day during the irrigation season, receive orders or demands from the defendant's stockholders or their nominees for the delivery of specified quantities of water. Each of the defendant's ditch riders has a specified section of defendant's canals to control, such sections usually ranging from five (5) to fifteen (15) miles in length; and the ditch rider will receive the orders or demands for water from the farmers

along his section of the canal. If direct irrigation water only is then being delivered, the ditch rider will divide the water to the farmers who have placed their said orders or demands on a pro rata basis according to stock-ownership. If storage water is then being delivered, the sum total of the orders or demands will be forwarded to the lake tender or to the superintendent of the company or to the Denver office of the company; and water will be turned out of the lake or reservoir, if available, to satisfy these orders or demands on a pro rata stockholder's basis. Defendant's ditch rider sets the headgate or weir on defendant's canal so as to divert the water called for from the pro rata share of the farmer's water into the farmer's individual lateral, and from this point the farmer has direct and sole charge of the carriage of such water through the farmer's individual lateral and the application of the water to the farmer's land.

24. The above-mentioned reservoir tenders and ditch riders, in addition to the work that each does, as hereinbefore provided, collectively and interchangeably, keep the canals of defendant free from weeds, rubbish and sand and in good repair for the free and uninterrupted flow of water therethrough; keep the reservoirs and their dams, embankments and outlet structures and all stream diversion works and structures in good repair and working order for the safe storage and flowage of water therefrom; keep the diversion headgates and weirs to the individual farmer's laterals in good repair and operating order for the delivery of water into said laterals; patrol the canals, reservoirs, and other appurtenant structures, and attend to diverting the water from the natural streams and the reservoirs; conduct and run the said water through and out of said canals and reservoirs and through the diversion headgates and weirs into the farmers' individual laterals; and, during the irrigation season, keep in daily contact with the farmers under defendant's system, and learn of their wishes and accept their orders for the delivery to each farmer of his portion of the water of defendant's system. All of this work is necessary to the maintenance and operation of the defendant's irrigation system and to the running and delivery of water thereby

through the diversion headgate or weir into the individual farmer's lateral for the production of said agricultural crops.

25. During the irrigation season, many of defendant's ditch riders normally spend five (5) or six (6) hours a day in patrolling their respective sections of defendant's canals and measuring and delivering the water to the individual laterals of the farmers and performing maintenance work on defendant's canals. Two (2) to three (3) hours a day are normally spent by such ditch riders in making up their company required reports for their day's work and reporting to the defendant's main office as to the water which has been delivered to each stockholder during the day, which reports thereupon become a part of the defendant's business records. Said employees are subject to call for such work during the irrigation season seven (7) days a week.

26. During the storage season, which covers roughly the late fall, winter and early spring months, employees of defendant are engaged in general repair and maintenance work necessary to the maintenance and operation of defendant's irrigation system, and work approximately eight (8) hours a day for six (6) days a week.

27. The number of ditch riders, lake tenders and maintenance men mentioned above range upwards from sixteen (16) to approximately twenty-six (26).

28. In numerous and diverse work weeks in the year some of defendant's lake tenders and ditch riders and other maintenance employees have worked in excess of forty (40) hours in the work week and have not been paid over-time for their hours in the work week in excess of forty (40) at one and one-half ( $1\frac{1}{2}$ ) times their regular rate of pay. For the most part during the irrigation season, which includes the late spring, summer and early fall months, these employees are paid on a flat monthly salary basis for all hours worked without over-time. During the non-irrigation season these employees for the most part are paid on a day basis for each day of work. Drag



line operators and some of their helpers have been paid on a straight hourly rate basis.

29. In the Denver office there are employed and work for the defendant Frank N. Bancroft, President; Mrs. F. K. Smith, Secretary; and H. H. Bryant, Superintendent (who also works in the field as such Superintendent). It is agreed, for the purpose of this case only, that the above three (3), namely, Frank N. Bancroft, President;

22 Mrs. F. K. Smith, Secretary; and H. H. Bryant, Superintendent; and L. James Billington, Foreman, are not involved in this case, since, upon the basis of the information furnished plaintiff, these employees probably are exempt under Regulation 541 of the plaintiff, as executive, administrative or professional employees. Defendant also contends that they are further exempt under the agricultural exemption in the Act, with which contention plaintiff disagrees.

30. Mr. Ermil E. Coler is now employed in defendant's Denver office as a bookkeeper and as an accountant. Mr. Coler has charge of and keeps the books of the defendant company, including receipts and disbursement ledgers, bank and financial account ledgers, showing banking deposits and withdrawals and expenditures for all of the activities of the company, and prepares the annual financial statement of the company which is printed and distributed to all stockholders. He examines the daily diary or work reports from each ditch rider or lake tender for each day; he checks the daily diary or work reports with the time sheets that are turned in monthly by each ditch rider and lake tender to see that the time sheets are correct, and if correct, he apportions the total time shown by the monthly time sheet among all of the different accounts against which the work done is charged. Mr. Coler, in the absence of the secretary, has charge of and keeps the records showing the assessments paid by the stockholders of the defendant and the records relating to the delivery of water. He prepares most of the records and reports required of the defendant by state and federal law. He assists an outside certified public accountant in the annual audit of the defendant's books. All the work performed by Mr. Coler, as bookkeeper and accountant, is necessary



in the conduct of defendant's business and to the keeping of correct records and to the proper keeping of the defendant's records and accounts. Mr. Coler at times works in excess of forty (40) hours per week without being paid time and one-half for work in excess of forty (40) hours per week.

For the purposes of this case only, defendant does not contend that Mr. Coler is exempt under either the "administrative" or "executive" provisions of the Act, but does contend that if within the coverage of the Act, Mr. Coler is included in the exemption as to the "employees engaged in agriculture."

31. The defendant, as regards its employees, keeps and preserves the following records:

- (a). Names in full.
- (b). Home addresses.
- (c). As none of defendant's regular employees are under 19, dates of birth are kept only in connection with Social Security applications. Minor employees, if any, are only employed by the defendant as temporary employees in the non-irrigation season or during the existence of an emergency.
- (d). Occupations in which employed.
- (e). Place or places of employment.
- (f). Total daily or weekly straight time earnings or wages for all employees not employed on a monthly salary basis.
- (g). Total additions to or deductions from wages paid each pay period.
- (h). Total wages paid each pay period.
- (i). Date of payment and the pay period covered by payment.
- (j). Regular hourly rate of pay for all employees not employed on a monthly salary basis.

(k). Hours worked each work day and total hours worked each work week if employee is employed on an hourly basis.

The defendant, as to its employees, has not kept and preserved records with respect to: (a) Time of day and name of the day on which the work week began; (b) Hours worked each day (if in excess of 8 hours) and total hours worked each work week if employee is on a monthly salary basis; (c) Total weekly over-time excess compensation.

It is the defendant's contention that it is not required to keep records relating to the payment of over-time for the reason that its employees are within the exemption "employed in agriculture" as that phrase is used in the Fair Labor Standards Act of 1938, with which contention the plaintiff Administrator disagrees. (Defendant objects to the introduction of evidence of the facts in this paragraph stated upon the ground that such record-keeping is not necessary or required of it and that said facts are irrelevant, immaterial and incompetent to any issue in this case.)

32. That in the month of December 1940, the Administrator of the Wage and Hour Division of the United States Department of Labor issued his "Interpretative Bulletin No. 14" entitled, "Agriculture, Exemption of Agriculture; and on The Exemptions for Processing Agricultural Commodities", a copy of which, marked "Exhibit 5," is attached hereto and made a part hereof for the information of the Court, and which bulletin is the latest such bulletin promulgated by said department covering "agriculture."

Pursuant to Section 11(c) of the Fair Labor Standards Act, the said Administrator issued "Regulations on How to Keep Wage and Hour Records under the Fair Labor Standards Act of 1938," a copy of which, marked "Exhibit 6," is attached hereto and made a part hereof for the information of the Court, and which regulations are the latest such regulations promulgated by said Admin-

istrator covering the keeping of "wage and hour records."

Dated this 26th day of September, A.D. 1946.

WILLIAM S. TYSON,  
Solicitor

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Regional Attorney  
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Attorneys for Defendant.

25. Filed September 27, 1946.

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Exhibit 1

Copy of the present Articles of Incorporation after giving effect to the amendments from time to time:

Articles of Incorporation of The Farmers  
Reservoir and Irrigation Company

Know All Men by These Presents, That we, Joseph Standley, Milton Smith, and Thomas B. Croke, residents of the State of Colorado, have associated ourselves together as a corporation under the name and style of The Farmers Reservoir and Irrigation Company, for the purpose of becoming a body corporate and politic, under and by virtue of the laws of the State of Colorado, and in accordance with the provisions of the laws of said State, we do hereby make, execute and acknowledge In Triplicate this certificate in writing of our intention so to become a body corporate under and by virtue of said laws.

First. The corporate name and style of our said cor-

poration shall be The Farmers Reservoir and Irrigation Company.

Second. The objects for which said Company is incorporated are: (To acquire, construct, maintain and operate a very long list of canals, reservoirs, and other property necessary for the purposes of the Irrigation Company, this description covering forty-eight closely written typewritten pages, which we are not copying here, but which we will furnish if desired.)

Third. Section 1. The capital stock of said Company shall be divided into Ten Thousand Five Hundred (10,500) shares of the par value of One Hundred (\$100.00) Dollars each and each share of said stock, subject to the provisions of these Articles, shall be of the same class or series and of equal rank and right and shall entitle the holder thereof to an equal pro rata share of the available water supply of the Company, not exceeding Ten (10) acre feet per annum, subject to such rules, regulations and by-laws as may from time to time be adopted and made effective by the Board of Directors of the Company; provided, however, that said Board of Directors shall have the power to administer from time to time any stock of the Company in the treasury of the Company in such manner as in the judgment of said Board shall be for the best interest of the Company.

Section 2. The system of this Company, for purposes of water distribution, shall be and is hereby divided into five divisions to be more particularly defined by the Board of Directors of the Company from time to time as follows:

Division No. 1—Marshall Lake Division, which shall include Marshall Lake;

26 Division No. 2—Standley Lake Division, which shall include Standley Lake;

Division No. 3—Westminster Pipe Line Division, which shall include Westminster Pipe Line;

Division No. 4—Barr Lake Division, which shall include Barr Lake;

Division No. 5—Milton Lake Division, which shall include Milton Lake.

In addition to the works specifically included in each division, as above stated, the Board of Directors of the Company shall have the right from time to time to define which other works of the system shall be included within each division.

Section 3. Subject to change as hereinafter provided, the Ten Thousand Five Hundred (10,500) shares of the capital stock of the Company are hereby allocated to and among each of the divisions of this Company's system and the entire water supply available for each such division shall hereafter be pro rated among the number of shares allocated thereto as follows:

Division No. 1—Marshall Lake Division, 1439 shares,

Division No. 2—Standley Lake Division, 2735 shares,

Division No. 3—Westminster Pipe Line Division, 164 shares,

Division No. 4—Barr Lake Division, 4252 shares,

Division No. 5—Milton Lake Division, 1910 shares.

Provided, however (and also subject to change as hereinafter provided), that as soon as a ditch by way of cut off shall be constructed by the Company from the Bull Canal to the Community Canal, then, forthwith, One Hundred Forty (140) shares of the stock of the Company, by this section allocated to Marshall Lake Division, shall thereby and thereupon become allocated to the Standley Lake Division of the Company's system and thereafter the entire water supply available for each division of the Company's system shall be pro-rated among the number of shares allocated thereto as follows:

Division No. 1—Marshall Lake Division, 1299 shares,

Division No. 2—Standley Lake Division, 2875 shares,

Division No. 3—Westminster Pipe Line Division, 164 shares,



Division No. 4—Barr Lake Division, 4252 shares,

Division No. 5—Milton Lake Division, 1910 shares.

Nothing in these Articles contained shall be construed as limiting the place of use of water delivered on the stock of this Company.

Section 4. Said allocation of stock of this Company to and among each of the Divisions of this Company's system herein made shall be changed only in the following manner, to-wit:

(a). By unanimous consent of the Board of Directors of the Company, or

(b) By the affirmative vote of not less than Sixty (60%) per cent of the outstanding capital stock of the Company cast at a general or special meeting of the stockholders, the call of either of which shall give notice of such proposed vote; provided, however, that the Board of Directors of the Company may by majority vote thereof permanently or temporarily, from time to time, change and vary the allocation of stock set forth in Section 3 of this Article if by so doing the total stock allocated to any particular division shall not at any time be increased or decreased more than Twenty-five (25) shares from that in said Section 3 stated.

Section 5. Any stock of this Company in the treasury of the Company shall only be sold pursuant to affirmative action of the Board of Directors of the Company assented to by not less than Four-fifths ( $4/5$ ) of all the Directors.

Section 6. None of the stock of this Company allocated and to be supplied from the ditches, reservoirs and works of this Company situate east of the South Platte River shall be entitled to demand or receive the transfer of any water from existing reservoirs or ditches of the Company situate west of the South Platte River.

Section 7. Each and every share of the capital stock of the company, except stock in the treasury of the company, shall be subject to annual assessments, which said assessments or any other assessment shall be payable without

reference to the quantity of water desired by or deliverable to any stockholder in any particular season. Water shall not be delivered on any stock of the company until all assessments thereon and any indebtedness of the holders of said stock to the company, then due and payable, shall be paid in full, and the failure to pay any such assessments at the time or times and in the manner provided, shall subject such delinquent stock to sale or forfeiture in accordance with the statutes of the State of Colorado and the by-laws of the company. No stockholder shall have any right to any future credit or deduction for the failure to demand or receive any particular quantity of water.

Section 8. Cumulative voting shall be permitted at all meetings of the stockholders of this Company.

Fourth. The said company shall have perpetual existence.

Fifth. The affairs and management of this corporation are to be under the control of a Board of seven (7) directors.

Sixth. The principal business of said Company shall be carried on within the Counties of Adams, Arapahoe, City and County of Denver, Jefferson, Boulder, Gilpin, Grand, Park and Weld, in the State of Colorado, and the principal office and place of business of the Company shall be kept in the City of Denver and State of Colorado.

Seventh. The Board of Directors of said Company shall have power to make such prudential by-laws as they may deem proper for the management of the affairs of the Company, and to change, alter, amend, modify or  
28 annul the same at pleasure, provided said by-laws are not inconsistent with the laws of the State of Colorado, or of the United States of America.

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#### Exhibit 1A

#### By-Laws of The Farmers Reservoir and Irrigation Company

## Article I.

## Officers.

Section 1. The officers of the Company shall consist of a President, Vice-President, Secretary and Treasurer. They shall hold office for one year and until their successors are duly elected and qualified. The offices of Vice-President and Treasurer and of Assistant Secretary and Assistant Treasurer, or Secretary and Assistant Treasurer, or Treasurer and Assistant Secretary, may be held by the same person. The board of directors may appoint an Assistant Secretary and an Assistant Treasurer, or an Assistant Secretary and Treasurer. The President shall be selected from the board of directors. The other officers of the company need not be members of the board of directors.

Section 2. The President, Vice-President, Secretary and Treasurer shall be elected by the Board of Directors at the first meeting of the Board following the annual meeting of the stockholders in each year, a majority of all of the Directors being necessary to a choice. An Assistant Secretary or an Assistant Treasurer or an Assistant Secretary and Treasurer may be appointed by the Board of Directors at any regular or special meeting of the Board.

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## Article IV.

## Directors — Qualifications — Meetings — Powers.

Section 1. The Directors shall be stockholders of the company.

Section 2. The corporate powers of the Company shall be exercised by the Board of Directors, which shall have general control and supervision over the property, affairs and management of the Company and its officers. It shall pass upon and may require reports from the officers of the Company at any time, and, in addition to its general powers, shall have all the specific rights, powers and authority mentioned, conferred or implied in or under the statutes of the State of Colorado, the Articles of Incorporation.

poration of the Company, and these By-laws. The meetings of the Board of Directors shall be held at the office of the Company in the City and County of Denver, Colorado, and may be called at any time by the President or by four (4) Directors upon three (3) days' notice by mail or twenty-four (24) hours' notice in person or by telephone or telegraph. Four (4) Directors shall constitute a quorum. When all of the Directors shall be present at any meeting, however called or notified, or shall sign a written consent thereto on the records of such meeting, or shall sign an approval of the minutes of any such meeting, all the acts of such meeting shall be as valid as if such meeting had been duly and regularly called and held, and each of the Directors actually present at any meeting or who shall sign such written consent to or approval of the minutes of such meeting shall be bound by the acts and proceedings thereof.

## Article V.

### Stockholders' Meetings

Section 1. The annual meeting of the stockholders shall be held at the office of the Company or at such other place designated in the notice thereof in the City and County of Denver, Colorado, on the last Tuesday of September of each year, notice of which meeting shall be given and published as required by law. At the annual meeting Seven (7) directors shall be elected by the stockholders and such other business transacted as may come before the meeting. The election shall be by ballot and a majority of all the stock issued and outstanding shall constitute a quorum for the transaction of business at any and all meetings of the stockholders, but a less amount may adjourn the meeting from time to time.

Section 2. A special meeting of the stockholders may be called at any time by the Board of Directors of the Company, and the Board of Directors shall call such special meeting upon the written request of the record owners of one-third of the outstanding capital stock. Any such special meeting of the stockholders shall be held either at the office of the company or at such other place



as may be designated in the notice, in the City and County of Denver, Colorado, and notice of such special stockholders' meeting shall be given and published as required by law with respect to the annual meeting of the stockholders, unless a different character of notice is required by statute. No business shall be transacted at any special meeting except that mentioned and referred to in the notice thereof.

Section 3. Stockholders may be represented by proxies at all Stockholders' meetings, which proxies shall be in writing. The Voting Trustees and their successors designated under the Voting Trust provisions of the Stock Retirement Agreement of this Company, dated September 1, 1921, shall have the right, either in person or by proxy, to vote any stock subject to said Voting Trust during the life thereof, at any annual or special Stockholders' meeting. Cumulative voting shall be permitted at all meetings of the stockholders.

Section 4. The transfer books of the company shall be closed ten (10) days before any annual or special meeting of the stockholders, and only those stockholders shall be allowed to vote at any such meeting whose names shall appear upon the books of the company when the books are so closed.

## Article VI,

### Stock — Transfer — Allocation.

Section 1. Certificates of stock in this Company shall be transferable only upon the books of the Company upon surrender of such certificates properly endorsed, and no transfer of stock shall be made or recognized by this Company unless and until all past due assessments, together with interest thereon, and any other indebtedness due from such stockholder to the Company shall have been fully paid.

Section 2. For the purpose of equitably pro rating the entire water supply of the company, the Board of Directors is hereby authorized to divide the ditches, canals, reservoirs or works now or at any time hereafter compris-



ing the irrigation system of the company into divisions and to allocate to each of said divisions a fixed number of shares of stock of the company. The entire available water supply for each of the divisions into which the irrigation system of the company is divided as aforesaid, shall be prorated among the number of shares allocated thereto and the allocation of said stock and the divisions of the system to which the same is applicable as first fixed by the Board of Directors, shall not be changed except by affirmative action by the Board of Directors of the company, assented to by not less than four-fifths of all of the directors. No stock allocated and to be supplied from the ditches, reservoirs and works of the company east of the South Platte River shall be entitled to demand or receive the transfer of any water from any of the company's existing reservoirs or ditches situate west of the South Platte River.

Section 3. Stock of this Company, upon which water was delivered during the irrigation season of 1921 or prior thereto, shall be deemed allocated to the land upon which and to the division from which said water was used during the season of 1921, or, if not used during that season, to the land upon which and the division from which said water was delivered in the last irrigation prior to 1921, and any stock of this Company upon which no water was delivered during or prior to 1921 shall be deemed allocated to the land upon which and the division from which it is first used. No stock of the Company shall be transferred for use from the tract of land to which the same is allocated, as aforesaid, without the consent of the Board of Directors of this Company, and in no event shall any stock of this Company be transferred to or entitled to demand water from any division of the Company's irrigation system, if the total number of shares then allocated to such division is already in use or entitled to demand water from the reservoirs and ditches comprised within such division.

## Article VII.

### Distribution of Water.

Section 1. Each share of stock of this Company shall

be entitled to its pro rata share, not exceeding Ten (10) acre feet per annum of the entire water supply available from the particular division of the system to which said stock may be allocated, subject to these By-Laws and any rules and regulations which the Board of Directors may adopt, and provided any assessment or other indebtedness due from the Stockholder to the Company is not delinquent. Provided, however, this Company shall be under no obligation to deliver water to any stockholder or lateral in excess of the amount which can be applied to beneficial use, and the management may at any time decline to deliver water if the same is being wasted, or if the management has good reason to believe that the same will be wasted.

32 Section 2. All water delivered to stockholders shall be measured at the headgates in the ditches and canals of this Company through which said deliveries are made, but the Company reserves the right to decline to deliver or turn water into any lateral if, in its judgment, the land traversed by such lateral will be unnecessarily damaged, due to the negligent or improper construction, maintenance or operation of such lateral, either because of the absence of necessary drops, flumes, chutes, banks, rip rap, or otherwise, and in no event shall this Company be responsible or liable for the maintenance, operation, repair of or distribution of water from any private laterals connected with the Company's system.

Section 3. In the event the company is able to deliver during any season more than ten (10) acre feet per share from any Division of the system, such excess water for the current year only may be sold and delivered to stockholders in the order of their applications therefor, for such price and upon such terms as the Board of Directors may prescribe, but any stockholder so purchasing or receiving such excess water shall not thereby become entitled to any right to purchase excess water in any succeeding year, except as herein provided.

Section 4. The President or the Board of Directors of the Company for purposes of distribution may divide the Company's ditches or any of them into sections and ro-

tate or pro rate the available water carried through said ditch in such manner and at such times as shall seem best calculated to insure to each stockholder his pro rata share of that part of the Company's water supply available from that particular Division of the System to which said stock may be allocated.

Section 5. All headgates in the Company's canals shall be operated and maintained by and under the exclusive control of this company and no stockholder or any other person shall have the right to interfere with, reconstruct, repair, change, or alter, open or close said headgates or any of them in any manner whatsoever.

Section 6. This Company shall not be liable for shortage of water from any cause whatsoever, and shall have the right at all times, when in the judgment of the Board of Directors it may be reasonable necessary, to cease the running and delivery of water, in order to make repairs, changes or alterations, or for any other purpose.

Section 7. No stock of the Company shall be transferred from one tract of land to another without the consent of the Board of Directors, but nothing herein contained shall preclude either the Henrylyn Irrigation District or Chicago Title and Trust Company, as Trustee, in accordance with the Stock Retirement Agreement of September 1, 1921, from selling any Farmers Company Stock under any division of the system if as a result of such sale the total number of shares allocated to such division is not thereby increased beyond the number of shares allocated thereto at the time of such sale, but any such stock when sold and once applied to the irrigation of a particular tract of land shall not thereafter be transferred to other land without the consent of the Board of Directors of  
33 this Company.

Section 8. No water shall be delivered to any stockholder if said stockholder is in default in the payment of any assessment or other debt due this company. All assessments must be paid in cash (except as otherwise provided in said Stock Retirement Contract of September 1, 1921), and this Company shall be under no ob-

ligation to accept any warrants from Irrigation Districts in payment of assessments or other debts unless such warrants can be immediately cashed on presentation to the proper County Treasurer.

Section 9. The Board of Directors of the Company reserves the right at any time, either in cases of emergency or otherwise, to adopt such further rules and regulations with respect to the distribution of the Company's water supply as may seem to it advisable.

### Article VIII.

#### Assessment of Stock.

Section 1. This corporation shall make an assessment on the capital stock annually in such an amount as will raise funds sufficient to keep its ditches, canals, reservoirs and other property in good repair, to pay the costs of maintenance and operation of said system, to pay any indebtedness and all interest thereon, including any amounts to be paid into a sinking fund or otherwise for the retirement of funded or other debts, and for any other necessary corporate purpose. The question of making such assessment shall first be submitted to the stockholders at the annual meeting, or at a special meeting called for that purpose, and such assessment shall be authorized and made effective by a majority of the stock issued and outstanding, represented either by the owners in person or by proxy and voting thereon, voting in favor of making such assessment, but in case said stockholders fail to hold any such meeting, or fail to make or authorize by the first of April in any year any such assessment or an assessment in amount sufficient to provide for the repair of its ditches, canals, reservoirs and other property, for the payment of the cost of maintenance and operation of said system and for the payment of any indebtedness and all interest thereon, including any amounts to be paid into a sinking fund or otherwise for the retirement of funded or other debts, and for any other necessary corporate purpose, then the Board of Directors of this Company shall forthwith make an assessment in such amount as may be necessary in order to fulfill the requirements of this sec-



tion at any regular meeting or at a special meeting called for that purpose. An action may be maintained to recover any assessment against any delinquent shareholder or said delinquent stock may be sold or forfeited for the failure to pay such assessments, as by law and these By-laws provided, and the Company reserves the right to recover such assessments either by action or sale and forfeiture, or both, and this Company shall have a perpetual lien upon such shares of stock and the water rights represented by the same for any and all such assessments and all parts thereof, until the same are fully paid.

Section 2. All assessments levied or made under the provisions of these By-laws or the laws of the State of Colorado shall be due and payable at such time or times and in such installments as the Stockholders or Board may determine, or the Stockholders may make the  
34 assessment and fix the amount thereof, leaving the time or times of payment and the installments in which the same shall be paid to be determined by the Board of Directors. All such assessments shall be and remain a lien upon each share of stock until the assessment against such share shall be fully paid, and if such assessment or any part thereof shall not be paid when due, interest shall be charged thereon from the date the same becomes due at one-half ( $\frac{1}{2}$ ) of one (1) per cent. for each and every month or fraction thereof, but the right to charge such interest shall not in any manner impair the right to sell and forfeit said delinquent stock as hereinafter provided, or to maintain an action for the recovery of said delinquent assessments and enforce the lien thereof against such delinquent stock.

Section 3. An action may be maintained in the name of this corporation to recover any installment of any assessment which shall remain due and unpaid for the period of twenty (20) days after personal demand therefor, or in case personal demand is not made within thirty (30) days after a written or printed demand has been deposited in the post office properly addressed to the post office address of such delinquent stockholder, but such remedy shall be cumulative only and shall not affect or

impair the right of this company to sell and forfeit such delinquent stock as hereinafter provided

Section 4. All shares of stock upon which any assessment or any installment thereof so made and levied shall not have been fully paid when due shall be considered delinquent, and the Secretary of this Company shall, as soon as conveniently possible after the last installment of such assessment becomes due, make demand upon the delinquent stockholders so in default for the amount due on all the shares of stock upon which said assessment, together with interest as aforesaid, has not been fully paid, which said demand shall be made either in person or by written or printed notice and duly mailed to the last known address of each such delinquent stockholder, at least thirty (30) days prior to the time when said delinquent stock shall be forfeited and sold, which said notice shall also state the time when and place where such delinquent stock will be sold unless the amount due thereon, including interest and the cost of advertising, is not paid before the time fixed for such sale. The Secretary shall also, as soon as conveniently possible after the last installment of said assessment is due, make a list of all the shares of stock on which the assessments have not been fully paid, together with interest, giving the names of the delinquent stockholders as shown upon the books of the company, the numbers of the delinquent certificates, the number of shares and the amount of such assessment remaining unpaid, and shall, if directed by the Board of Directors, have the same advertised by publication at least once each week for four consecutive weeks in a daily or weekly newspaper published in the City and County of Denver, Colorado, the first publication thereof to be at least thirty (30) days prior to the date fixed in such notice for such sale, which said notice shall also state the time and place at which such shares of stock shall be forfeited and sold unless payment of the amount due thereon shall have been made prior to the time of sale. If the owner or owners of such stock shall fail to pay the amount due upon such shares, together with the accrued interest thereon and the cost of advertising

35 before the time fixed in such notice for such sale,

said delinquent stock shall be forfeited and the Secretary shall proceed to sell at public auction at the time and place designated in said notice, to the highest bidder for cash in hand, the said delinquent stock, or so many shares of the stock belonging to each such delinquent stockholder as may be necessary to pay the amount of his delinquent assessments, together with interest and the cost of advertising as aforesaid. If the price for which the necessary share or shares shall be sold shall exceed the amount due with interest and costs of advertising, such excess shall be paid to the delinquent stockholder, and no sale of delinquent stock shall take place within less than sixty (60) days from the date the assessment was made.

Section 5. The Company may become the purchaser of any stock forfeited and sold as aforesaid for the failure to pay assessments, and if at any such sale there shall be no bids made for such delinquent stock, the Secretary of this Company shall bid the same in, in the name of the Company for the amount due thereon, including interest and cost of advertising.

Section 6. The remedies herein provided for the collection of such assessments are cumulative and shall be in addition to every other remedy now or hereafter existing or provided by law.

Section 7. Each and every share of the capital stock of the company, except stock in the treasury of the company, shall be subject to annual assessments, which said assessments or any other assessments, shall be payable without reference to the quantity of water desired by or deliverable to any stockholder in any particular season. Water shall not be delivered on any stock of the company until all assessments thereon and any indebtedness of the holders of said stock to the company, then due and payable, shall be paid in full, and the failure to pay any such assessments at the time or times and in the manner provided, shall subject such delinquent stock to sale or forfeiture in accordance with the statutes of the State of Colorado and the by-laws of the company. No stockholder shall have any right to any future credit or deduction for

the failure to demand or receive any particular quantity of water.

\* \* \* \* \*

## Article X.

### By-Laws.

These By-laws and any rules and regulations from time to time adopted by the Board of Directors of the Company may be altered, revised, amended, supplemented, or repealed at any meeting of the Board of Directors called for that purpose, by a majority vote of the entire Board, provided said amendments or additions are not inconsistent with the laws of the State of Colorado or of the

36 United States or the Articles of Incorporation of the Company or any contractual or other obligations assumed by the Company.

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[It is not practicable to reproduce copies of Exhibit 2, general map, canal and reservoir system, The Farmers Reservoir and Irrigation Company, for insertion in the printed record. Copies of the exhibit have been furnished for the use of the Court.]

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## Exhibit 3

### Direct Irrigation Water

As illustrative of and typical of the numerous decrees granted to the canals and reservoirs of the defendant, we quote from the "Findings of Fact and Decree" entered in the adjudication proceeding entitled "In the Matter of the Adjudication of Priorities of Water Rights for the Use of Water for Irrigation and Other Beneficial Uses in Irrigation District No. 7, in Division No. 1, in the State of Colorado," being Cause No. 60,052 on the Docket of the District Court within and for the City and County of Denver, Colorado. We have, for the sake of brevity, omitted the caption, recitals as to procedural steps and other



recitals not deemed relevant but are quoting all applicable portions:

"Now, on this 13th day of May, A. D. 1936, this matter coming on for final hearing and adjudication upon the report, findings and recommended decree of William H. Wadley, Referee appointed herein, to whom this matter was referred by order of this court entered on the 21st day of October, 1915, and upon the evidence produced before the said referee on file herein; upon the objections and exceptions filed to said recommended decree of the said referee, upon additional claims and petitions filed in said cause, as well as the further and additional testimony taken before the court, on file herein;

\* \* \* \* \*

"Two previous adjudications have been held, fixing priorities to rights to use of water of Irrigation District No. 7 for irrigation purposes. The first terminated in the general water adjudication of this Court entered the fourth day of October, 1884. The second terminated in the decree of this Court of the ninth day of October, 1895. All priorities herein treated are inferior to the lowest priorities of said decree of October 4, 1884, and October 9, 1895.

"All canals, ditches, reservoirs, pumping plants and irrigation systems hereinafter mentioned, except as specifically stated to the contrary in the particular findings and particular findings and particular portion of the decree relating thereto, are situated in Water District No. 7, or are properly adjudicable herein.

"Irrigation for Water District No. 7, as defined by statute, 'consists of all lands irrigated from ditches taking water from Clear Creek and its tributaries.'

"The numbers given the ditches and reservoirs as adjudicated herein begin in order of seniority of right following the next lower numbers awarded in said last rendered decree of October 9, 1895, and are numbered consecutively thereafter in this decree, and the relative  
38 priorities here awarded follow the lowest number of said decree according to seniority.

"As to appropriations taking effect before the lowest priority awarded in said decrees of October 4th, 1884 and October 9th, 1895, but barred, by failure to earlier make proof, to claim priorities superior to the lowest in said decree, said appropriations are, in order of seniority of completion, given priority numbers next following the lowest priorities of said decree of 1895.

"The court has accordingly numbered the ditches, reservoirs and diversion works and their respective priorities as hereinafter set forth in these findings as to each particular ditch and reservoir, and as shown at the beginning of the decree herein, to which reference is hereby made.

"1st.

"The court finds generally as applying to all the ditches, ponds, lakes and reservoirs hereinafter specified that are adjudged to have ditch, pond, lake or reservoir rights for use in storage or impounding water for irrigation, stock, or domestic purposes herein, that there was and is at all times herein so-called surplus or storage water in Clear Creek during the non-irrigating season from, to-wit: on or about the 1st day of October of each year during and until, to-wit on or about the 1st day of April of the following year, that was, and is, subject to appropriation and use by the various owners of the certain ditches, ponds, lakes and reservoirs, upon lands in this district, as hereinafter set forth, and that the said respective owners of said lands, ditches, ponds and reservoirs, did at the time hereinafter specified in each claim for storage water, build and construct their certain ditches, ponds, lakes and reservoirs, or use the same for storing and impounding the surplus or storage waters of Clear Creek during the non-irrigating season, which is not definitely settled as to a definite date but generally speaking is defined as from and after on, to-wit: on or about the said 1st day of October of each year, during and until on, to-wit: on or about the 1st day of April of the following year.

"2nd.

"The court further finds generally from the evidence

that the said various claimants hereinafter specified have duly demanded and received from time to time, as hereinafter stated, the said surplus or storage waters in Clear Creek during said non-irrigating season, and have impounded and stored the same by means of certain ditches, ponds, lakes and reservoirs, to be used for irrigation of their lands hereinafter specified and described in their respective claims herein.

"3rd.

"The court further finds from the evidence that the said various claimants hereinafter specified have not demanded or received direct irrigation water for storage, or  
39 stored the same, at any time herein, when said direct flow water was needed, or demanded for direct irrigation or domestic purposes.

"4th.

"The court finds from the evidence that the only time or times that the claimants, or any of them, have stored or impounded direct flow water from Clear Creek, during the said irrigating season from said, to-wit: April 1st, to, to-wit: October 1st, each year, was upon occasion of heavy rains or floods, at times when the direct flow water of said Clear Creek was not demanded or used for direct irrigation.

"5th.

"The court finds from the evidence that there are a large number of owners of small ponds, settling lakes or reservoirs in this district, some of whom have and some of whom have not intervened, petitioned, or come into this proceeding, to adjudicate or have heard claims to such small incidental use of their said irrigating or storage water in such small lakes, ponds or reservoirs to use the same for settling tailings, watering stock, for domestic use or temporarily to impound or store their said irrigating water in order to get an irrigating head or for a more economical distribution and use of the same in irrigating of their lands.

"6th.

"The court finds that all and singular the several canals, ditches, pipe lines, pumping plants and reservoirs, ponds and lakes, and other diversion works hereinafter set forth, be ordered, adjudged and decreed to have the several rights, numbers and priorities to the waters of the several streams and other sources of supply, respectively, as hereinafter more particularly set forth; subject, however, to the following provisions, to-wit:

"7th.

"The court finds that this decree shall not in any way affect or limit the right of said users to direct flow irrigation water, as hereinafter described to utilize said water by means of small settling ponds, small lakes or reservoirs, to temporarily impound or store said water for a reasonably short time to accumulate an irrigating head, or to enable a more economical distribution and use of the water during the irrigation season; that they may at all times use the water in said ponds, lakes and reservoirs for domestic and stock purposes, and said use is hereby adjudged, confirmed, protected and decreed by this decree as an incident to any irrigation, storage or water rights they own.

"8th.

"No part of this decree shall in any case be taken, deemed or held to confirm, impair, or in any manner affect any claim or right or property claimed or held by any person, association or corporation, in or to any ditch, canal or reservoir, or any part thereof, or to any land or part thereof, on which any of the same may be situated, or the land held or claimed as right-of-way of  
40 any of them, or any right, interest, or claim of property whatever in or relating to any of them.

"9th.

"No part of this decree shall be taken, deemed, or held as affecting in any manner any question or claim of right among the owners or claimants of any such ditch, canal



or reservoir in relation to each other, whether as part owners or shareholders therein or as stockholders in any corporation, or joint stock company, claiming or to claim the same, or any part thereof, nor shall it affect the rights, interests or claim of any consumer of water for irrigation or domestic purposes, whether as part owner, lessee, shareholder or stockholder in any corporation holding or controlling the same, or as purchasers of water therefrom as against the rights, interests or claims of any other party or parties interested or claiming interest or right in or to such ditch, canal or reservoir, as owner, lessee, or part owner thereof, or as shareholder, or stockholder in any corporation claiming the same, or as the purchaser of water therefrom, neither shall it affect the claim of any priority other than as herein specifically decreed, made or resisted as between the parties using the water for said purposes or any other purposes from the same ditch, canal or reservoir, as to such water.

"10th.

"No part of this decree shall in any manner affect any question between two or more parties claiming or owning priorities on Clear Creek or its tributaries in any case where the water in said streams or any of them sinks and rises to the surface again between the location of the headgates of their respective ditches, canals or reservoirs, or in any dispute as to the identity of the water appropriated by either party out of such sinking and rising of the waters in any of said streams.

"11th.

"This decree shall not affect any claim, interest or right of any corporation as to the right of property in any ditch, canal, or reservoir on which the same may be situated, or any question which may arise between the stockholders thereof or between them and the State, People, or any party upon the dissolution of such corporation by expiration of its charter or otherwise, as to any appropriation of water or rights secured by condemnation proceeding by such corporation during its legal existence.

"12th.

"No part of this decree shall affect in any way any right, claim or interest now or hereafter held or claimed to any appropriation or right to use of water from any ditch or reservoir initiated or constructed after Nov. 19, 1935, date of the closing of the testimony herein, nor shall it affect the rights of parties to this proceeding to show additional beneficial use of water made after November 19, 1935, the date of the closing of testimony herein, or thereafter, on the part of any diversion works which is given the right by this decree to later show additional use and completion of appropriation.

"13th.

"The priorities herein decreed and established and the use of the respective amounts of water hereby adjudged and awarded are restricted, and said water is only allowed to flow into said ditches and reservoirs in said ratio and proportion as at present adjudged and decreed, and, further, no water diverted by any of said ditches, canals, pipe lines, reservoirs, or other diversion works shall be used for any but the beneficial purpose for which said right is given, nor shall said water be used except upon lands, and none of it shall be permitted in any manner to run to waste, or to be applied in other than in economical manner and any and all excessive use of water is hereby prohibited.

"14th.

"Nothing in this decree shall be deemed, taken or held to deny or in any manner impair or derogate from the right of any claimant to the use of water for such domestic purpose as were, or are, incident to the appropriation for agricultural purposes established by any decree of this Court, now or heretofore rendered in relation to the ditch, canal, pipe line, or reservoir, or decreed domestic water of any such claimant, but, with said exceptions, no persons are entitled to divert or use the waters of this water district for domestic, power, or any beneficial use other than agricultural.

## "15th.

"This decree shall be taken, deemed and held, as determining and establishing the several priorities of right by appropriation to the use of water from the natural streams and sources of supply of said irrigation of Water District No. 7 for agricultural, domestic, mechanical, and other beneficial purposes incident to the several ditches, canals, pumping plants, and reservoirs in said water district, each according to the construction, enlargement, or extension thereof, with the amount of water held to have been appropriated so far as said amount is stated in this decree. In fixing the numbers of priorities in this decree the numbering is begun with the next number following the lowest number priority of the decree of October 9, 1895.

## "16th.

"All priorities and rights to use of water awarded in this decree, taking water from the supply of this water district, which are adjudged to have taken effect on the same date are of equal seniority as to each other, regardless of different numbers which they have been given in this decree. Dates of taking effect, rather than  
42 number fixed to the priorities, shall control seniority and right, except as hereinafter expressly adjudged and decreed.

## "17th

"As to appropriations here first decreed, but which originally took effect upon dates earlier than the lowest priorities of this water district awarded in the decree of this court entered on October 9th, 1895, said appropriations are, for failure to have the same earlier adjudicated, herein held to be barred to have awarded them earlier priorities superior to the lowest priorities in said decree.

"But as between each other, appropriations so barred to have awarded them priorities superior to those so heretofore decreed in the said decree of October 9, 1895, shall in ditch and reservoir classes respectively rank, as to priorities of right as between each other in order as they originally took effect.

"18th.

"The court finds that whenever the dimensions of any ditch, pipe line, pumping plant, or any feeder to a reservoir are found, or the height to which any reservoir may be filled, is stated in this decree, such dimensions shall be deemed and taken to control the statement of the estimated carrying capacity thereof and such height shall be deemed and taken to control the statement of the estimated storage capacity of any such reservoir.

"19th.

"All descriptions of land herein are in ranges numbered with reference to their order West of the Sixth Principal Meridian. Wherever carriage capacity or right of diversion works is stated herein as a certain number of cubic feet per second, the word 'second' means 'second of time.' Wherever the depth of water or depth of water flow is given herein, there is meant the depth of water it is capable of carrying. Wherever the depth of a reservoir is stated herein, there is meant the depth of water stored above the base of its outlet tube, unless otherwise expressly stated. Wherever a county is herein named, it is a county of the State of Colorado. All corporations herein named are corporations organized under the laws of the State of Colorado, except The Realty Investment Company, which is organized under the laws of New Jersey.

"20th.

"All use of water for irrigation in this region carries with it as an ordinary and necessary incident, the right to use such water for household purposes and watering of animals naturally attendant upon cultivation of the soil and stock raising by those actively engaged in those occupations; other than this incidental use, no claimant is entitled to use the waters of this water district, as herein adjudicated, for the purposes other than irrigation, except as herein decreed.

"21st.

"The court further finds that claimants of storage



rights for impounding water in reservoirs, small ponds and lakes and the rights of ditches to take water for direct irrigation shall be governed by the date of the  
43 construction of any such reservoirs, small ponds or lakes or ditches and the appropriation of the water for same as specified and determined.

"The Court further finds that claimants of storage rights for impounding water in reservoirs, lakes and ponds, as defined herein, and the rights of ditches to take water for direct irrigation, shall, as to their priorities, be governed by the dates of the construction of any such reservoir, lake or pond, and the date of the construction of any such ditch or ditches, and the appropriation for each thereof is specified and determined by this decree, which is determined and fixed upon the principle that first in time is first in right.

"22nd.

"That nothing herein shall be construed to prevent the impounding of direct flow irrigating water in a pond, lake or reservoir for settling purposes, or creating an irrigating head for a reasonably short time for the purpose of making a more practical and economical use of the water for direct irrigation, watering stock or domestic purposes.

"23rd.

"That in all cases wherein there is a conflict of evidence, if any, on the various issues herein, the Court finds the issues of fact, law and equity as stated and decreed herein in this decree without further repetition hereof.

"24th.

"Subject to the last several mentioned provisions, it is further found as to said ditches, canals, pipe lines, pumping plants, reservoirs and diversion works, awarded priorities herein, that all said work so given priorities take their water from the supply of Irrigation District No. 7, Division No. 1, of the State of Colorado, and are properly adjudicable in this proceeding, and the several appropriations and rights to use of water by means of them

are respectively bound as in and by the findings of the Court.

"25th.

"The Court has examined and takes judicial notice of the decrees heretofore entered, and now on file in the office of the State Engineer, and particularly known as the decrees of October 4th, 1884, and the decree of October 9th, 1895.

\* \* \* \* \*

"In particular as to each ditch, diversion works or reservoir the court finds and decrees the following separate provisions as to each particular ditch, diversion works, or reservoir:

\* \* \* \* \*

"Croke Canal.

Ditches Nos. 88 and 89.

"1.

44 "This ditch is claimed by The Farmers Reservoir and Irrigation Company, a Colorado corporation, whose principal place of business is 311 C. A. Johnson Building, Denver, Colorado.

\* \* \* \* \*

"Decree.

Ditches Nos. 88 and 89.

Croke Canal.

"That said Ditch, as set forth in the findings herein is entitled to Ditch Priority No. 76 and 72-a on Clear Creek, No. 24 and 24-a on Ralston Creek and No. 3 and 3-a on Leyden Creek. It is claimed by The Farmers Reservoir and Irrigation Company, Colorado corporation. It takes its supply of water in Water District No. 7 from Clear Creek, Ralston Creek and Leyden Creek. Its headgate on Clear Creek is on the north bank of said creek in the

northwest quarter of the northeast quarter (NW $\frac{1}{4}$  NE $\frac{1}{4}$ ) of Section 26, Township 3 South, Range 70 West of the 6th P. M., Jefferson County, Colorado. Its headgate on Ralston Creek is at a point where said canal crosses Ralston Creek in Section 1, Township 3 South, Range 70 West of the 6th P. M., Jefferson County, Colorado, at a point near the center of said section. Its headgate on Leyden Creek is at a point where said canal crosses Leyden Creek in the northwest quarter (NW $\frac{1}{4}$ ) of Section 31, Township 2 South, Range 69 West of the 6th P. M., Jefferson County, Colorado. Said canal extends from its headgate on Clear Creek into and through Standley Lake and into and through Big Dry Creek to its extension known as the Bull Canal, and through said Standley Lake to its extension known as Niver Canal, and from said Niver Canal into White Cap Canal and across the South Platte River into the enlarged Burlington Ditch and O'Brian Canal, and through Barr Lake into and through the Bowles Seepage Ditch or Beebe Canal, the Neres Canal, the Speer Canal and the Brighton Lateral, the location and capacity of all of which are set forth in the Findings herein. Said Standley Lake is an integral part and parcel of said Croke Canal and is used for the purpose of diverting, carrying, controlling, regulating and distributing in the most economical manner and to the greatest advantage the waters diverted into and through said canal, as well as for storage purposes, and said Standley Lake is a part and parcel of said canal, in its use as a carrier of water for direct irrigation constitutes a regulating and expansion basin by which the water diverted into and through said canal for direct irrigation may be checked and temporarily retained for the purpose of making a more economical distribution during the irrigation season.

"The waters diverted on this priority into and through said Croke Canal are used for domestic and direct irrigation purposes upon the lands located thereunder  
49 and under its various extensions aforesaid. Said Croke Canal is also used as a feeder or intake ditch for Standley Lake for storage purposes.

"It is hereby adjudged and decreed that said Croke Canal be, and the same is hereby given Ditch Priority No. 76 on Clear Creek, No. 24 on Ralston Creek and No. 3 on Leyden Creek, to date from March 4, 1902, for 944 cubic feet of water per second of time in the aggregate from Clear Creek, from Ralston Creek and from Leyden Creek by original construction and use for the benefit of the parties lawfully entitled thereto, for domestic and direct irrigation purposes on lands lying under said Croke Canal and its various extensions, and that said Standley Lake, as an integral part and parcel of said Croke Canal may be used for the purpose of diverting, carrying, controlling, regulating and distributing the water diverted on this priority, and as a regulating and expansion basin by which said water so diverted into said Croke Canal may be checked and temporarily retained for the purpose of making a more economical distribution thereof during the irrigation season. Said priority is subject and junior to the lowest priority fixed by the decree entered in this Court on October 9, 1895.

"It is further hereby adjudged and decreed that in addition to the priority hereinabove finally decreed to said Croke Canal, a conditional decree is hereby granted to said Croke Canal to be known as Ditch Priority No. 76-a on Clear Creek, No. 24-a on Ralston Creek and No. 3-a on Leyden Creek, to date from March 4, 1902, for an additional quantity of water over and above said 944 cubic feet of water per second, for diversion from said Clear Creek, Ralston Creek, and Leyden Creek, but not in excess of an additional 1056 cubic feet of water per second, provided that it shall hereafter be established in a proper proceeding that such additional quantity of water  
50 has been applied to beneficial use with reasonable diligence and within a reasonable time after date of entry of this decree."

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### Exhibit 3A

#### Storage or Reservoir Water

(First 7 pages of Exhibit 3 are equally applicable to this exhibit.)



## "Reservoirs Nos. 89 and 90

## Standley Lake or Enlargement of Kinnear Reservoir

## "I.

"This reservoir is claimed by The Farmers Reservoir and Irrigation Company, a Colorado corporation, whose principal place of business is Denver, Colorado.

51

## "Decree.

## Reservoirs Nos. 89 and 90.

## Standley Lake or Enlargement of Kinnear Reservoir.

"That said reservoir, as set forth in the findings herein, is entitled to Reservoir Priority No. 74 and 74-a on Clear Creek, No. 6 and 6-a on Ralston Creek and No. 2 and 2-a on Leyden Creek. It is claimed by The Farmers Reservoir and Irrigation Company, a Colorado corporation. It is located in Jefferson County, Colorado, on all or parts of Sections 16, 17, 20, 21, 22, 28 and 29, Township 2 South, Range 69 West of the 6th P. M. Its inlets or feeder ditches are the Croke Canal and the Church Ditch and the enlargements thereof. It takes its supply of water from Clear Creek, Ralston Creek and Leyden Creek. Its inlet, the Croke Canal, has its headgate on Clear Creek on the north bank thereof in the northwest quarter of the northeast quarter (NW $\frac{1}{4}$  NE $\frac{1}{4}$ ) Section 26, Township 3 South, Range 70 West of the 6th P. M., Jefferson County, Colorado, and has its headgate on Ralston Creek in Section 1, Township 3 South, Range 70 West of the 6th P. M., Jefferson County, Colorado, at a point near the center of said section, and its headgate on Leyden Creek in the northwest quarter (NW $\frac{1}{4}$ ) of Section 31, Township 2 South, Range 69 West of the 6th P. M., Jefferson County, Colorado. Its other inlet, the Church Ditch (also known as the Golden City and Ralston Creek Ditch), has its headgate on the north bank of Clear Creek at a point in the northeast quarter (NE $\frac{1}{4}$ ) of Section 32, Township 3 South, Range 70 West of the 6th P. M., Jefferson County, Colorado, 1450 feet south, 69 degrees 30' west from the northeast corner of said section.

"The outlets of Standley Lake are Niver Canal and Big Dry Creek, a natural stream, which is used as an extension of Croke Canal, and which Big Dry Creek, together with the Bull Canal which takes out therefrom, is sometimes referred to as Bull Canal. Said Niver Canal continues to and across Clear Creek and into the White Cap Canal which continues to and across the South Platte River into the Enlarged Burlington Ditch and O'Brian Canal which has its headgate on the east bank of the South Platte River in Section 14, Township 3 South, Range 68 West of the 6th P. M., and which extends to and

56 through Barr Lake to the headgates of the Bowles Seepage Ditch or Beebe Canal, the Neres Canal, the Speer Canal, and the Brighton Lateral, the location and capacity of all of which are shown in the findings entered herein. Said Standley Lake, in addition to being a storage reservoir is also a part and parcel of the Croke Canal for which a decree for direct irrigation and domestic purposes is being entered herein, and as such part and parcel of said Croke Canal is used as a regulating and expansion basin for the water diverted into said Croke Canal for direct irrigation and domestic purposes. The waters stored in said reservoir are used for irrigation and domestic purposes on lands lying under said reservoir and its outlet ditches and the extensions thereof.

"It is hereby ordered, adjudged and decreed that there be allowed to flow into said reservoir for the uses aforesaid and for the benefit of the parties lawfully entitled thereto under and by virtue of appropriation by construction and use and Reservoir Priority No. 74 on Clear Creek, No. 6 on Ralston Creek and No. 2 on Leyden Creek, to date from March 4, 1902, the amount and quantity of water, exclusive of losses in the intake canals and in said reservoir resulting from seepage and evaporation, required to fill said reservoir to the depth of 87 feet above the bottom of the Big Dry Creek or Bull Canal outlet of said reservoir estimated at 1,409,645,160 cubic feet or 32,361 acre feet of water to be diverted from Clear Creek, Ralston Creek and Leyden Creek through the Croke Canal at not in excess, in the aggregate from said three creeks, of the

rate of 944 cubic feet of water per second and to be diverted from Clear Creek through Church Ditch at not in excess of the rate of 211 cubic feet of water per second and to be diverted through Church Ditch from Ralston Creek at not in excess of the rate of 185 cubic feet of water per second.

"Said priority is subject and junior to the lowest priority fixed by the decree entered in this court on October 9, 1895.

"This decree is in addition to the decree heretofore entered for Kinhear Reservoir for 40,962,478 cubic feet of water.

"It is therefore further ordered, adjudged and decreed, that in addition to the priority hereinabove finally decreed to said Standley Lake a conditional decree is hereby granted to said Standley Lake to be known as Reservoir Priority No. 74-a on Clear Creek, No. 6-a on Ralston Creek and No. 2-a on Leyden Creek, to date from March 4, 1902, for an additional quantity of water over and above said quantity hereinabove finally decreed but not in excess of 27,408,440 cu. ft. or 16,699 acre feet of water; provided that it shall hereafter be established in a proper proceeding that such additional quantity of water has been stored in said reservoir and applied to beneficial use with reasonable diligence and within a reasonable time after date of entry of this decree. Said additional quantity of water so conditionally decreed shall be diverted from Clear Creek, Ralston Creek and Leyden Creek into and through the Croke Canal at not in excess, in the aggregate from said three creeks, of the rate of 944 cubic feet of water per second, and into and through the Church Ditch from Clear Creek at not in excess of the rate of 211 cubic feet of water per second, and into and through Church Ditch from Ralston Creek at not in excess of the rate of 185 cubic feet of water per second; provided that this decree is without prejudice to the right of the claimant by the same priority number and date to increase the rate  
57 of diversion on both said final decree and said conditional decree herein granted to a total of not in excess of the rate of 2,000 cubic feet of water per second in

Croke Canal from Clear Creek, Ralston Creek and Leyden Creek, if it shall hereafter be shown in a proper proceeding that water on said priorities was diverted into said lake into and through said Croke Canal at such greater rate with reasonable diligence and within a reasonable time after date of entry of this decree.

#### Exhibit 4.

#### Annual Statement

#### The Farmers Reservoir and Irrigation Company

Year Ended August 31, 1946

No attempt is made in this statement to list the decrees, water rights or other property of the Company, the Statement confining itself strictly to Cash Receipts and Disbursements and to the Company's Bonded Indebtedness.

#### Statement of Cash Receipts and Disbursements

August 31, 1945, cash on hand.....\$ 20,770.40

#### Cash Receipts

Stock Assessments .....	\$130,210.36	
Receipts from Church Ditch, Hudson Laterals, South Boulder and Coal Creek Ditch, and Jacob Lehl .....	8,530.26	
Rental from Leases.....	5,551.73	
Receipts from Other Irrigation Companies on Division of Expenses, etc. ....	10,993.04	
Interest on Delinquent Assessments .....	478.90	
Sundry Receipts .....	5,551.38	
Accounts Receivable (Purchase of Tunnel Water) Contra .....	7,747.00	
<b>Total Receipts .....</b>		<b>169,062.67</b>
<b>Total To Be Accounted For.....</b>		<b>\$189,833.07</b>



## Disbursements

Bond Principal .....	\$ 14,000.00
Bond Interest .....	18,560.00
Sinking Fund, Class A Bonds .....	7,440.00
Note Payable — Wichita Bank for Cooperatives .....	7,269.83
Note Interest — Wichita Bank for Cooperatives .....	730.17
Maintenance of Irrigation System .....	49,535.57
Operation of Irrigation System .....	16,947.09
Tools and Equipment .....	1,194.75
Assessments on Stock of Other Ir- rigation Companies .....	6,015.75
Purchase of New Bucket for Koeh- ring Dragline .....	534.74
Stock of Other Companies .....	10.00
Superintendent .....	3,150.00
Salaries of Officers .....	3,452.00
Attorneys' Retainer Fee .....	3,780.00
Salaries of Office Employees .....	4,176.00
Automobile and Truck Expense .....	3,939.64
Telephones .....	1,376.66
Office Rent .....	900.00
Directors' Fees and Expenses .....	978.00
Indemnity and State Compensa- tion Insurance .....	596.79
Office Supplies and Equipment .....	620.47
Taxes .....	148.43
General Expense .....	665.15
Expenditures for Other Irrigation Companies—Charged to Them .....	5,338.89
Paid Out (Purchase of Tunnel Wa- ter) Contra .....	7,747.00
Federal and State Social Security Taxes .....	576.24
Sundry Disbursements .....	5,403.98
Auditing .....	300.00

Purchase of New P & H Dragline 10,087.04

Total Disbursements .....	175,474.17
August 31, 1946, Cash on Hand .....	14,358.90
Total Accounted For .....	\$189,833.07

### Statement of Bonded Indebtedness as of August 31, 1946

Authorized Bonds ..... \$850,000.00

Treasury Bonds to be used for purposes provided in Reorganization Plan approved by the Federal Court ..... \$ 75,000.00

\*Bonds Issued as provided by Reorganization Plan and for purposes therein specified (Dated January 1, 1943, maturing July 1, 1960) ..... 155,000.00

Bonds Paid to Date ..... 170,000.00      400,000.00

Outstanding Bonds in the hands of the public, to be amortized over period of time beginning with July 1, 1947, and ending with July 1, 1960 ..... 450,000.00

\*Collateral Note, Wichita Bank for Cooperatives (Dated March 8, 1943), secured by \$52,000.00 Bonds (Returned to Our Possession \$103,000.00 Bonds and Coupons) ..... \$ 51,340.19

Installments Paid to Date ..... 29,162.52

Total Liability Wichita Bank for Cooperatives (Includes Stock Ownership of \$2,400.00) ..... 22,177.67

Grand Total Bond and Note Liability ..... \$472,177.67

F. K. Smith,  
Secretary.

# AGRICULTURE

## EXEMPTION OF AGRICULTURE; AND ON THE EXEMPTIONS FOR PROCESSING AGRICULTURAL COMMODITIES

DECEMBER 1940<sup>1</sup>

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UNITED STATES DEPARTMENT OF LABOR  
WAGE AND HOUR DIVISION  
OFFICE OF THE ADMINISTRATOR

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## **Exemption of Agriculture; and on the exemptions for Processing Agricultural Commodities**

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### **Introduction**

1. Section 13 (a) (6) renders the wage and hour provisions of the act inapplicable to employees employed in "agriculture," as that term is defined in section 3 (f); section 7 (c) renders the hour provisions of the act totally or partially inapplicable to employees of employers engaged in certain types of operations upon agricultural or horticultural commodities, dairy products, poultry, or livestock; and section 13 (a) (10) renders the wage and hour provisions of the act inapplicable to persons employed in certain types of activities with respect to agricultural or horticultural commodities or employed in making dairy products. This bulletin will set forth the construction of these sections which will guide the administrator in the performance of his administrative duties unless he is directed otherwise by authoritative rulings of the courts or unless he shall subsequently decide that his prior interpretation is incorrect.

The bulletin will not deal with the question of what employees engaged in agriculture or in the processing of agricultural products are engaged "in (interstate) commerce or in the production of goods for (interstate) commerce" so as to entitle them to the benefits of the act. For statements as to the coverage of the act, see Interpretative Bulletins Nos. 1 and 5. These and other interpretative materials and regulations can be obtained on request from the Wage and Hour Division.

### **Agriculture**

2. Section 13 (a) (6) of the Fair Labor Standards Act exempts from both the wage and hour provisions "any employee employed in agriculture."

"Agriculture" is defined in section 3 (f) as follows:

"'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

An employee is exempt by virtue of section 13 (a) (6) if, but only if, his work falls within the specific language of section 3 (f). If during any workweek an employee performs work some of which is exempt under section 3 (f) and some of which is not exempt, the exemption does not apply to him during that workweek. It is our opinion, in other words, that there can be no segregation within a workweek between exempt and nonexempt operations.

Paragraphs 3 to 13 of this bulletin, which follow, will discuss the operations described in section 3 (f). Employees engaged in the described operations are not subject to the wage and hour provisions of the act.

### **Cultivation and Tillage of the Soil**

3. The term "cultivation and tillage of the soil" includes all the operations necessary to prepare a suitable seedbed, eliminate competing weed growth and improve the physical condition of the soil.

### **Dairying**

4. The term "dairying," includes the work of milking cows or goats, putting the milk into containers, cooling it, and storing it on the farm. Furthermore, the legislative history of the act indicates that if the farmer and his employees engage in such operations as separating the cream from milk obtained from the farmer's cows or goats, bottling such milk and cream, or making butter and cheese out of such milk and cream, these operations also fall within the exemption.

### **Production, Cultivation, Growing, and Harvesting of Any Agricultural or Horticultural Commodities**

5. (a) The term "production, cultivation, growing . . . of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended)" includes all customary operations in connection with raising any "agricultural or horticultural commodities." The term "harvesting of any agricultural or horticultural commodities" includes all operations customarily performed in connection with the removal of the crops by the farmer from their growing position in the field, greenhouse, etc. The act, it should be noted, makes no distinction between employees on the basis of the purpose of their employers in producing, cultivating, growing, and harvesting agricultural or horticultural commodities. Hence, if the employer owns a factory and a farm and operates the farm only for experimental purposes in connection with the factory, those of his employees who devote all their time during particular workweeks to the production, cultivation, growing, and harvesting of agricultural or horticultural commodities are nevertheless exempt from the act during such workweeks.

(b) The term "agricultural or horticultural commodities" includes the following: grains, forage crops, fruits, vegetables, nuts, sugar crops, fibre crops, tobacco, nursery products, and eggs. Thus, employees engaged in raising wheat, corn, hay, onions, carrots, sugarcane, or seed, or any other agricultural or horticultural com-

modity, are engaged in "agriculture" and are exempt from the wage and hour provisions of the act. This is true, even if the employer has other employees engaged in other operations which are not within the definition of "agriculture." For example, if an employer has a factory and farm located on the same land, the employees working exclusively on the farm, who produce, cultivate, grow, and harvest agricultural or horticultural commodities, are not subject to the wage and hour provisions of the act, while those employed at the factory may be subject to the act.

(c) Section 8 (f) defines "agriculture" to include the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, including those defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended. Since the Agricultural Marketing Act includes oleoresin from a living tree within the definition of "agricultural commodity," the production, etc., of such oleoresin is within the exemption provided in sections 13 (a), (b) and 8 (f). Similarly, under the Agricultural Marketing Act, if the employer who produces the oleoresin puts such oleoresin through a process of distillation and derives gum spirits of turpentine and gum rosin therefrom, such turpentine and rosin also come under that act's definition of "agricultural commodity." Those activities are, therefore, also within the definition of "agriculture" contained in section 8 (f). If turpentine and rosin are derived in any other manner, however, as by digging up pine stumps and grinding them or by distilling the turpentine with steam from the oleoresin within or extracted from wood, as distinguished from the living tree, or if the person who produces the spirit of turpentine or rosin from oleoresin from a living tree does so not only from oleoresin produced by him but also from oleoresin delivered to him by others, the exemption is inapplicable to the employees engaged in such operations. Under these circumstances the turpentine and rosin are not agricultural commodities within the meaning of the aforesaid section 15 (g) of the Agricultural Marketing Act, as amended, and their production is therefore not within the definition of "agriculture" contained in section 8 (f).

(d) Some commodities such as mushrooms, flowers, and seeds, instead of being grown in open fields, are frequently grown in enclosed houses, greenhouses, or hotbeds. As long as the commodities are agricultural or horticultural, their production, cultivation, growing, and harvesting fall within the exemption, whether they are grown in enclosed houses or in the open field.

(e) The employees of a nursery who are engaged in the following activities are employed in "agriculture":

1. Sowing seeds and otherwise propagating fruit, nut, vegetable and ornamental plants or trees, and shrubs, vines and flowers;
2. Handling such plants, etc., from propagating frames to the field;
3. Planting, cultivating, watering, spraying, fertilizing, pruning, bracing, and feeding the growing crop.



The term "agriculture," as used in the act, "does not include the science and art of cultivating forests. Consequently, one who is engaged in planting seedlings is not exempt unless the seedling is a nursery product or unless the operation is performed as an incident to or in conjunction with farming operations. On the latter point reference is made to Interpretative Bulletin No. 7, which discusses the question when forestry or lumbering operations are incident to or in conjunction with farming operations so as to constitute "agriculture."

### Raising of Livestock

6. The term "raising of livestock" includes the breeding, fattening, feeding, and general care of the following animals, among others: cattle, sheep, swine, horses, mules, jackasses or goats. It does not include such operations as feeding the livestock at the stockyards.

Since the act makes no distinction with respect to employees on the basis of the purpose for which the livestock is raised, employees engaged in such raising would be exempt from the wage and hour provisions of the act, even if the livestock was raised to obtain serum or virus or was raised under contract for others.

### Raising of Bees

7. The term "raising of bees" refers to all of those activities customarily performed in connection with the handling and keeping of bees, including the treatment of disease and the raising of queens.

### Raising of Fur-Bearing Animals

8. The term "raising of fur-bearing animals" includes all of those activities customarily performed in connection with the breeding, feeding, and caring for animals which bear fur of marketable value, including the treatment of disease. The fur-bearing animals included, among others, are rabbits, silver foxes, minks, squirrels, and muskrats.

### Raising of Poultry

9. The term "raising of poultry" includes the breeding, feeding, and general care of poultry. The word "poultry" includes domesticated fowl and game birds.

### Practices \* \* \* Performed by a Farmer

10. The term "practices (including any forestry or lumbering operations) performed by a farmer" as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market involves many diverse matters. As to a discussion of when forestry or lumbering operations are incident to or in conjunction with farming operations, reference is again made to Interpretative Bulletin No. 7.

It should be noted with respect to all of these practices that they must be performed by the farmer and his employees and that such practices must be incident to or in conjunction with the farming operations of the farmer. It makes no difference whether they are performed on or off the farm if performed by a farmer. The line between practices which are incident to or in conjunction with farming operations, and those which are not, is not susceptible of precise definition. The agricultural exemption, however, would seem to include only practices which constitute a subordinate and established part of the farming operations. Factors that would indicate that the practices performed by a farmer are thus subordinate would be, among other things, that most of the employees engaged in such practices are normally employed also in farming operations upon the farm, and that these practices occupy only a minor portion of the time of the farmer and such employees and do not constitute the farmer's principal business.

When a farmer is engaged in these practices on agricultural or horticultural commodities grown on other farms as well as his own, as for example, when he cans tomatoes which come both from his farm and from the farms of others, such operations do not seem to be incident to or in conjunction with his farming operations. In our opinion such operations assume the aspect of an independent business and do not fall within this exemption.

#### Forestry or Lumbering Operations) Performed by a Farmer

(a). The term "forestry or lumbering operations" refers to the cultivation and management of forests, the felling and removal of timber, and the conversion of logs and timber into rough lumber and similar products. It also includes the piling, stacking, and storing of all such products. "Wood working" as such is not included.

#### Preparation for Market (Performed by a Farmer)

(b) The term "preparation for market" must be treated differently with respect to various commodities. The following activities, among others, when performed by a farmer, seem to be included within the term:

1. *Grain, seed, and forage crops.*—Weighing, binning, stacking, cleaning, grading, shelling, sorting, packing, and storing.

2. *Fruits and vegetables.*—Assembling, binning, ripening, cleaning, grading, sorting, drying, preserving, packing, storing, and canning.

3. *Nuts (pecans, walnuts, peanuts, etc.).*—Grading, cracking, shelling, cleaning, sorting, packing, and storing, unshelled nuts; and performing the same operations except cracking and shelling, upon the nut meats.

4. *Sugar.*—Manufacturing raw sugar, cane, or maple syrup and molasses.

5. *Eggs.*—Handling, cooling, grading, and packing.

6. *Wool.*—Grading and packing.

7. *Dairy products.*—Salting, printing, wrapping, packing, and storing butter; ripening, molding, wrapping, packing, and storing cheese; and canning or packing any other dairy product.

8. *Cotton*.—Weighing, ginning, and storing cotton; hulling, delinting, cleaning, sacking, and storing cottonseed.
9. *Nursery stock*.—Handling, wrapping, packaging, and grading.
10. *Tobacco*.—Handling, drying, bulking, stripping, tying, sorting, stemming, packing, and storing.
11. *Livestock*.—Handling and loading.
12. *Poultry*.—Culling, grading, cooping, and loading.
13. *Honey*.—Assembling, extracting, heating, ripening, removing comb, straining, cleaning, grading, weighing, blending, packing, and storing.
14. *Fur*.—Removing the pelt, scraping, drying, putting on boards, and packing.

**Delivery to Storage (Performed by a Farmer)**

(c) The term "delivery to storage" includes taking the commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, or poultry to the places where they are to be stored or held pending preparation for or delivery to market.

**Delivery \* \* \* to Market (Performed by a Farmer)**

(d) The term "delivery \* \* \* to market" includes taking the commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, or poultry to market.

**Delivery \* \* \* to Carriers for Transportation to Market (Performed by a Farmer)**

(e) The term "delivery \* \* \* to carriers for transportation to market" includes taking the commodities, dairy products, livestock, bees or their honey, fur-bearing animals or their pelts, and poultry to a carrier—truck, railroad, ship, etc.—for transportation by such carrier to market.

**Other Practices (Performed by a Farmer)**

(f) Besides the practices listed in the statute as being incident to or in conjunction with farming operations, there are other practices included within the exemption.

The actual selling of the agricultural or horticultural commodities, etc., is such a practice. The truck drivers working for a farmer, who haul garbage and feed to the farm for feeding pigs, also perform practices that are exempt. If a company has sugarcane fields and also a mill, the transportation of its own sugarcane to the mill seems an incidental practice which is included in this term.

It must be emphasized with respect to all practices performed by a farmer, for which a claim is made that they are incident to or in conjunction with his farming operations, that they must be performed *only* on the agricultural or horticultural commodities, dairy products, livestock, bees, fur-bearing animals, or poultry produced or raised by him. The same limitation applies with respect to the practices discussed in paragraph 11, below.



## Practices \* \* \* Performed \* \* \* on a Farm

11. The term "practices (including any forestry or lumbering operations) performed \* \* \* on a farm as an incident to or in conjunction with" farming operations, involves substantially the same inquiries as those discussed in paragraph 10.

It should be observed, however, that since these practices must be performed *on a farm*, one of the activities listed in the statute, namely, delivery to market, cannot normally be one of the included practices, for that involves working off the farm. Hence, employees of independent contractors engaged in transporting to market agricultural or horticultural commodities, dairy products, poultry, livestock, bees or their honey, and fur-bearing animals or their pelts, would not be exempt. With that exception, practices described in paragraph 10, even if performed by employees of someone other than the farmer, are excluded from the wage and hour coverage of the act, so long as they are performed on the farm and "as an incident to or in conjunction with such farming operations."

Thus, if an independent contractor threshes wheat on a farm, his employees are not subject to the wage and hour provisions of the act while they are so engaged on the farm where the wheat is grown. So, too, employees of an independent contractor who inspect and cull flocks of poultry on a farm are exempt while they are working on the farm where such poultry is raised. Similarly, employees erecting a silo on a farm are exempt while they are working on such farm.

## Office Workers, Etc.

12. We have received inquiries concerning office help—secretaries, clerks, bookkeepers, etc.—night watchmen, maintenance workers, engineers, etc., who are employed by a farmer or on a farm in connection with the activities described in the definition of "agriculture" contained in section 3 (f). In our opinion such employees are exempt.

## Commission Brokers

13. Employees of commission brokers do not fall within the exemption for the reason that the practices performed by them do not constitute practices performed by a farmer nor do they take place on a farm.

## Complete and Partial Exemptions Under Section 7 (c) From the Hour Provisions for Employees of Employers Engaged in Certain Operations on Agricultural or Horticultural Commodities and Poultry or Livestock

14. Section 7 (c) of the act provides:

"In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning, and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar beets, sugar beet mo-



lasses, sugar cane, or maple sap, into sugar (but not refined sugar) or into syrup, the provisions of subsection (a) shall not apply to his employees in any place of employment where he is so engaged; and in the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is so engaged."

Thus, it will be observed that this section grants the following exemptions:

1. A complete exemption from the hour provisions to employees "in any place of employment" where their employer is engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products.

2. The same complete exemption where the employer is engaged in the ginning and compressing of cotton, or in the processing of cottonseed.

3. The same complete exemption where the employer is engaged in the processing of sugar beets, sugar beet molasses, sugar cane, or maple sap into sugar (but not refined sugar) or into syrup.

4. An exemption, for a period aggregating not more than 14 workweeks in any calendar year, from the hour provisions to employees "in any place of employment" where their employer is engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables.

5. The same partial exemption from the hour provisions where the employer is engaged in the first processing, within the area of production (as defined by the Administrator) of any agricultural or horticultural commodity during seasonal operations.

6. The same partial exemption from the hour provisions where the employer is engaged in handling, slaughtering, or dressing poultry or livestock.

Where any exemption provided by section 7(c) is applicable, there is no limit to the hours which the employees may work during the exempt period without being entitled to any over-time compensation under the act.

### **First Processing of Milk, Whey, Skimmed Milk, or Cream Into Dairy Products**

15. In considering what activities fall within this term it seems essential to determine the significance of the word "processing." In our opinion "processing" connotes a change in the form of the raw materials. It follows that "first processing" means the first such change in the form of the raw materials. It should be noted that

with respect to the exemption now under discussion the raw materials may be either milk, whey, skimmed milk, or cream.

The "first processing of *milk*" includes the making of cooled and pasteurized milk, skimmed milk, cream, whey, curd, dried milk, condensed milk, evaporated milk, and clabber. It is also clear from the congressional debates that the making of nonprocess cheese is included within the "first processing of *milk*." However, the further processing of nonprocess cheese into process cheese is not included.

The "first processing of \* \* \* *whey*" includes the making of dried whey, whey cream, and milk sugar. The further processing of whey cream into whey butter is not included.

The "first processing of \* \* \* *skimmed milk*" includes the making of whey, wet casein, dried skimmed milk, condensed skimmed milk, and evaporated skimmed milk. The further processing of wet casein into dried casein and the further processing of the dried casein are not included.

The "first processing of \* \* \* *cream*" includes the making of butter, buttermilk, dried cream, and sour cream. The further processing of butter into process butter is not included.

As for the making of malted milk, ice cream mix, ice cream, and ice cream novelties, since their manufacture involves the use of ingredients other than milk, whey, skimmed milk, or cream to a substantial extent, and since their manufacture does not, in our opinion, constitute the first change in the form of the raw materials, such manufacture is not included within this exemption.

### Ginning and Compressing of Cotton

16. This term includes the operations of separating the cotton lint from the seed, pressing and wrapping such lint into bales, and then compressing such bales. The receiving and weighing of the lint, both before and after compressing, would also seem to be part of the compressing operation. Such operations, therefore, are included within the exemption.

The storing of cotton, either before or after compressing, is not, in our opinion, included in the term "ginning and compressing of cotton." Support for this position is found in the fact that the word "storing" was in the bill at one time in connection with an exemption from the hour provisions and was subsequently deleted. (See also par. 23.)

### Processing of Cottonseed

17. This term includes cleaning and removing hulls and linters from the cottonseed, extracting oil therefrom and making cottonseed cake or meal. These operations may be performed simultaneously or consecutively, and one employer may perform all of them or only some of them. In any event, such operations are outside the purview of the overtime provisions. The refining of cottonseed oil, however, is not included in this exemption.

# **Processing of Sugar Beets, Sugar Beet Molasses, Sugarcane, or Maple Sap, Into Sugar (But Not Refined Sugar) or Into Syrup**

18. The term "refined sugar" is commonly understood to refer to the product of the refinement of "raw sugar." The term "raw sugar" describes the product of the first processing of sugarcane, which product normally is thereafter refined before it is consumed. The processing of sugarcane into raw sugar is within the exemption, the processing of raw sugar into refined sugar is not within the exemption. Likewise the processing of cane molasses and syrup into refined sugar is not exempt.

Sugar obtained from sugar beets or sugar-beet molasses, by processes now in common use, is ready for direct consumption without further refining. Beet sugar thus produced is within the exemption. To hold otherwise would, in our opinion, render meaningless the words "processing of sugar beets, sugar-beet molasses."

The following are also within the exemption: (1) The manufacture of maple sugar from maple sap and (2) the manufacture of syrup from sugarcane and maple sap.

Operations performed on bagasse, such as removing same from the sugar mill, baling and compressing, are not included in the exemption, since such operations do not constitute the "processing of \* \* \* sugarcane", and further such operations do not result in sugar or syrup. The exemption, it should be noted, is limited to the processing of sugarcane "into sugar \* \* \* or into syrup."

## **First Processing of, or \* \* \* Canning or Packing, Perishable or Seasonal Fresh Fruits or Vegetables**

19. With respect to the operations included in this 14 workweeks exemption from the hour provisions of the act, it must first be pointed out that the exemption is applicable only if the operations are performed on perishable or seasonal *fresh fruits or vegetables*.

*Fresh* fruits and vegetables are the fruits and vegetables in their raw and natural state as distinguished from them after they are "processed," canned, or dried. Although nuts may be fruits, they are not *fresh* fruits even when newly picked. Similarly, dried fruits, and dry edible beans cannot be considered fresh fruits or vegetables.

If the fruits or vegetables in question are perishable or seasonal fresh fruits or vegetables as explained above, the following operations with respect to them fall within the exemption: Drying, freezing, preserving (for example, cucumbers or cherries in brine), packing, or canning (for an explanation of what constitutes "canning," reference is made to par. 34). The stemming of strawberries also seems to fall within the exemption.

The following operations are not exempt for they are not performed on fresh fruits or vegetables; making and canning of vinegar, canning of baked beans, chili, and tamales, crystalizing of citrus peel, making and canning of marmalade, repacking or recanning fruits



and vegetables, producing wine from grape juice, and drying of citrus waste for conversion into cattle food.

The storing of fruits and vegetables in a storage house does not seem to be a "first processing" operation and, hence, is not exempt.

**First Processing, Within the Area of Production (as Defined by the Administrator), of Any Agricultural or Horticultural Commodity During Seasonal Operations**

20. No attempt will be made here to discuss the expression "area of production," which limits this 14 workweeks exemption. For the Administrator's definition, reference is made to Regulations, Part 536, as amended, and to press release R-334 explaining the definition.

The term "any agricultural or horticultural commodity" seems designed to cover any such commodity not otherwise mentioned in the subsection. Consequently, it does not include milk, whey, skimmed milk, cream, cotton, cottonseed, sugar beets, sugar-beet molasses, sugarcane, maple sap, perishable or seasonal fresh fruits or vegetables, poultry, or livestock. Further, the term "agricultural or horticultural commodity" connotes the commodity as it comes from the farm and before any change is effected in its natural state. Thus, since nut meats, for example, are not agricultural commodities, the roasting thereof is not included in the exemption provided by this section. Similarly, since commercial fertilizer is composed of various substances, at least some of which are not agricultural commodities, it cannot be said that its manufacture is the processing of an agricultural commodity.

As set forth above, "first processing" connotes the first change in the form of the raw materials. Congress apparently did not mean to include in the exemption such operations as the manufacture of leather, the baking of bread, the manufacture of rope from hemp, the manufacture of cigars, etc., the spinning of thread, the manufacture of tallow, etc., although these operations may be the processing of materials originally produced from agricultural commodities.

Among operations included in the exemption are the following:

1. *Grains*.—Hulling, shelling, cracking, or grinding of whole grains, including the milling of flour. The further processing of corn into cornflakes, rice into puffed rice, and the making of malt or alcoholic beverages are not included.

2. *Forage crops*.—Grinding.

3. *Seeds, beans and peas*.—Hulling; extracting oil from flaxseed or linseed.

4. *Nuts*.—Roasting and extracting oil from unshelled nuts, shelling and picking. The further processing of shelled nuts is not included.

5. *Fibre crops*.—Decorticating.

6. *Tobacco*.—Stemming, redrying, and fermenting.

7. *Eggs*.—Breaking and separating. Grading, candling, refrigerating, buying, and selling eggs are not included.

(See also par. 33, subsec. 1.)

8. *Fur*.—Scraping and drying.

9. *Honey*.—Heating, scraping, and straining.



## Handling, Slaughtering, or Dressing Poultry or Livestock

21. The following activities are covered by the exemption: *Livestock*—transporting to the slaughterhouse, stockyards, or other place where the livestock is to be sold; receiving same; weighing, or otherwise determining the basis for payment to producers; grading; and selling; slaughtering; and dressing, i. e., bleeding, removing head, hide, hair, entrails, and dirt. *Poultry*—buying and transporting live poultry to the place where it is to be slaughtered; receiving same; weighing, or otherwise determining the basis on which the producer is to be paid; grading; cooping; and selling the live poultry; slaughtering; and all operations generally performed in connection with the dressing of poultry. The exemption also applies to the employees of brokers or commission houses if and to the extent that they are engaged in physically "handling" poultry or livestock.

The exemption applies only to the handling of poultry and livestock and not poultry and livestock products or byproducts. Thus, the manufacturing, curing, smoking, grading, refrigerating, and packing of meat products and byproducts, such as beef, veal, casing, pork cuts, pigs feet, sausages, fertilizer, tallow, grease, hides, offal, beef extracts, oleo products, sheep skins, and shortening, the processing of livestock and poultry meat for packing and canning purposes, and the packing and canning of such meat are not included.

A renderer, who disposes of the bodies of dead animals, and who makes and sells hides, grease, tallow and tankage, does not perform operations which are included within the exemption.

### Exemption Inapplicable to Employees Outside Place of Employment

22. With respect to both the complete and partial exemption from the hours provisions of the act under section 7 (c), the exemption is applicable only to the employees of an employer "in any place of employment where he is so engaged" (in the described operation). This raises the question of how the exemption operates where an employer has several establishments. It is our opinion that in such a case, each establishment, i. e., the plant together with the surrounding premises, constitutes a "place of employment" and the exemption applies separately to each establishment. It should be noted, however, that a "place of employment," although constituting only one establishment, may contain several buildings in which the exempt operations are performed. In that case, of course, there is only one exemption for the whole "place of employment."

Since section 7 (c) renders the hours provisions of the act inapplicable only to employees employed "in (the) place of employment" where their employer is engaged in performing the exempt operations, the employee must work in the establishment. Thus, employees who distribute advertising circulars do not seem to be within the exemption, for they are not employed at the "place of employment" where the employer is engaged in the exempt operations. However, truck drivers who carry raw materials to the establishment or who transport goods upon which the exempt operation has been per-

formed may be considered as working in the "place of employment," for they make regularly recurring trips to and from the establishment and may be deemed attached thereto. Further, some of their work, such as loading and unloading, takes place in the establishment. If a dairy concern has one establishment at which it makes butter and another at which it prints and wraps the butter, the exemption is inapplicable to the employees at the latter establishment, for they are not employed at the "place of employment" where their employer is engaged in the "first processing of milk," etc., into dairy products. So, too, if milk is condensed at one establishment and moved to another establishment where it is subjected to further processes, the employees working at the latter establishment are not exempt although those at the former establishment are exempt.

### Which Employees Are Exempt

23 (a) The determination as to whether all employees of the employer who are working in the establishment are included in the exemption or whether the exemption applies to only such employees as perform the operations described in the section must be made in the light of the legislative history of section 7 (c). The congressional debates show that the purpose of this section was to relieve processors of seasonal agricultural commodities from the hour provisions of the act so as to enable them more easily to conduct their operations during the peak seasons. It is our opinion, therefore, that only the employees who perform the operations described in section 7 (c) or who perform operations that are so closely associated thereto that they cannot be segregated for practical purposes, and whose work is also controlled by the irregular movement of commodities into the establishment, are covered by the exemption. For example, in the ordinary case, none of the employees in a department separate from the department in which the exempt operations are performed will be exempt. Thus, employees working in the meat-curing or sausage-making departments of a meat packing house will not be within the exemption.

(b) There is also the following related problem. Some canners of fruits and vegetables can both fresh and dried vegetables within the same workweek and in the same establishment and use the same employees for canning both types of commodities. The question then arises as to whether the employees are within the exemption. Since the purpose of the exemption is to facilitate the handling of seasonal or perishable fresh fruits and vegetables during peak seasons, that purpose would not be served by extending the exemption to the handling of nonseasonal and nonperishable fruits and vegetables. In our opinion, therefore, the exemption does not apply to employees so engaged. Of course, if the operations are segregated, the employees who perform the operations described in the section are exempt. Further, all employees are exempt during any workweek in which their employer is engaged in canning only seasonal or perishable fresh fruits and vegetables.

### Fourteen Workweeks Exemption Period

24. If an employer is entitled to a partial exemption under section 7 (c), he may select any 14 workweeks in the calendar year. They need not be consecutive. The workweeks he selects, however, must be workweeks in which he is engaged in the exempt operation. A workweek with respect to any employer means 7 consecutive days, provided that the workweek is not changed for the purpose of evasion of provisions of the act or any regulations prescribed pursuant thereto. If an employer elects to pay overtime compensation in a particular workweek, or if no overtime is worked during such workweek, that workweek is not included in the 14 exempt workweeks. Where the employees work overtime for more than 14 workweeks, the first 14 workweeks in which overtime is worked and for which they do not receive overtime compensation at the regular pay periods will be deemed to have been claimed by the employer under the exemption.

The employer, who is entitled to a partial exemption, cannot take that exemption for one set of employees and then take the same exemption for another set in the same establishment. The statute states that the exemption shall be applicable for 14 workweeks "to his employees" "in any place of employment" and that seems to mean all of his employees (subject to the limitations expressed in par. 23). In other words, the act does not provide consecutive exemptions for different sets of employees in the same establishment, but provides only one exemption. However, if an employer has several places of employment, as explained in paragraph 22, and conducts exempt operations in all of them, the exemption applies separately to each place of employment and the employer may take a different fourteen workweeks exemption for each.

### Total Exemption Under Section 13 (a) (10) "From the Wage and Hour Provisions for Employees Engaged Within the "Area of Production" in Certain Types of Operations Upon Agricultural or Horticultural Commodities, Including Dairy Products

25. Section 13 (a) (10) provides that neither the wage and hour provisions of the act shall apply with respect to:

- "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products."

The expression "area of production", which limits this entire exemption, will not be discussed in this bulletin. For the Administrator's definitions of that term, see Regulations, Part 536, as amended, and Release No. 334 explaining the definitions.



Before discussing the meaning of the various processes described in this section, certain preliminary observations seem appropriate.

First, the exemption provided in this section is from *both* the wage and hour provisions of the act and not only from the hour provisions.

Second, the exemption provided in this section depends upon the type of activity engaged in by the particular employee. That is, if the employee is engaged in one of the activities described in this section, he is exempt regardless of whether his fellow employees are similarly exempt.

Third, the words "for market," which are found in this section, limit all of the participles which precede it. In other words, the mere "handling" of an agricultural commodity by an employee does not render him exempt. He must be handling it "for market." Thus, an employee engaged in canning commodities for later recanning by his employer would not be engaged in canning for market and hence would not be exempt.

Fourth, the legislative history of this section indicates that the term "agricultural or horticultural commodities," as used in the section, means those commodities as they come from the farm and before any change has been effected in their natural form. Thus, although flour and raw sugar, for example, may be defined as agricultural commodities in special statutes, they are not agricultural commodities within the meaning of this section. Consequently, the following do not appear to be exempt operations, for all of them are performed on commodities that are not agricultural or horticultural within the meaning of the section: handling of grease, tallow and tankage, storing and packing of shelled pecans and other nut meats, the storing and packing of flour, spaghetti and cereals, the storing and packing of manufactured feed, the packing of corn meal, the packing and storing of alfalfa meal, the packing of milled rice, the conversion of citrus waste into cattle food, the storing and packing of dried fruits, the packing of pickled vegetables, the canning of marmalade, the storing and packing of sugar, molasses or syrup which have been extracted from sugarcane, sugar beets, or maple sap, any operations performed upon bagasse and beet pulp, the storing and packing of fermented or stemmed tobacco, the handling, packing and bottling of wine, vinegar, and pickles, and the packing of extracts and spices.

### Handling

26. The operations included in this term appear to be those physical operations customarily performed in obtaining agricultural or horticultural commodities from producers' farms, transporting them to and receiving them at the establishment, weighing them or otherwise determining on what basis the producer is to be paid, placing them in the establishment where further operations are to be performed, and delivering the commodities to warehouses. Specifically, these operations include loading the commodities on trucks, wagons, etc., in producers' fields or at concentration points, transporting them to the establishment, receiving and unloading them at the establishment, counting or weighing the commodities, assembling, binning, piling, or



stacking them in the establishment, moving them from one place to another in the establishment, moving the bags, boxes, cases, barrels, bales, coops, and other loaded containers to wagons, trucks, railroad cars or other conveyances, and transporting the commodities away from the establishment. Since it makes no difference that the employer does not own the goods being handled, the employees of brokers or commission houses who physically handle the goods may be within the exemption.

### Packing

27. Included in this term are those operations involved in placing agricultural or horticultural commodities in containers, and also the operations necessary to close or fasten such containers. Examples of specific activities, which are included in this term, are the sacking or bagging of unshelled pecans or other unshelled nuts, the sacking of grain, and the placing of fresh fruits and vegetables in crates.

In our opinion the term "packing" does not include operations carried on in meat-packing houses. Support for this proposition is found in the fact that where Congress intended to grant an exemption to the livestock industry, it did so in specific language. For example, in section 7 (c), a partial hour's exemption is granted to employees engaged in "handling, slaughtering, or dressing poultry or livestock." (See par. 21 of this bulletin for a discussion of the interpretations of that language.) Still further, for the reasons discussed in paragraph 25, meats, livestock products, etc., are not agricultural commodities within the meaning of section 13 (a) (10) and, therefore, the packing of them is not an exempt operation.

### Storing

28. Operations which appear to be included in this term are those involved in (1) placing agricultural or horticultural commodities in storage rooms or other places where the commodities are to be held prior to further preparation, sale or shipment; (2) taking care of the commodities while they are being so held; and (3) removing them from the storage rooms and transferring them to wagons, trucks, railroad cars, or other conveyances. Since the placing of cherries or cucumbers in brine is a preserving operation, which effects a change in the natural form of the commodities, it is not "storing" within the meaning of this section.

### Ginning

29. This term is normally applied only to the operation of processing seed cotton and the legislative history indicates that it was this operation which Congress had in mind. "Ginning" involves the operation of removing the seed from the lint and then pressing and wrapping the bale of lint. It does not include other operations which may be performed on the cottonseed or the cotton lint, even though such operations are performed in the same establishment where the ginning is done. For example, it does not include the processing of cottonseed.

### Compressing

30. This term is generally applied to the cotton industry only and the legislative history indicates that it was so intended by Congress. It includes the operations of receiving and weighing the baled cotton lint at the compressing establishment, placing the baled cotton lint in the presses, operating the presses, tying steel bands around the bales, and removing the bales from the presses. It is our opinion that the term does not apply to the pressing of a commodity in order to extract an oil, juice, or syrup therefrom. Hence, the extraction of oil, juice, or syrup from cottonseed, flaxseed, tung nuts, peanuts, soybeans, fruits or vegetables, sugarcane, sugar beets, rice, etc., does not fall within the exemption.

### Pasteurizing

31. This term usually refers to an operation performed upon milk or cream. It consists of heating the fluid milk or cream, holding it at a high temperature, and then cooling it. The placing of the milk or cream into bottles would also seem to be included in the term.

### Drying

32. The operations included in this term appear to be those performed on agricultural or horticultural commodities in order to remove or lower their moisture content. Such operations may be performed by natural methods or by exposure to heat from ovens, furnaces, etc. Typically, these operations are performed on fruits, vegetables, hay, and tobacco. The term does not include drying operations which take place on commodities that have ceased to be agricultural commodities within the meaning of section 13 (a) (10) because their natural form has previously been changed. Thus, the drying of eggs that have been broken and separated and the drying of tobacco that has been stemmed are not included within the exemption.

### Preparing in Their Raw or Natural State

33. The operations included in this term may be any of a large number that are performed in connection with many different kinds of agricultural or horticultural commodities. They do not include operations which change the form of the commodity or which are performed after the commodity leaves its raw or natural state.

The following examples will prove helpful in determining whether particular operations are included in the term:

1. *Eggs*.—Candling, sizing, grading, and cooling are included. Breaking, separating, mixing, and freezing are not included.

2. *Fruits and vegetables*.—Cleaning, washing, polishing, grading, sizing, sorting, hand-picking, coloring, cooling, and wrapping are included. Shelling, peeling, pickling, squeezing, pressing, cutting, and similar operations where the form of the commodities is changed are not included. Thus, the manufacture of preserves from fruits is not included.

3. *Grain, seeds, or forage crops.*—Cleaning, hand-picking, sorting, grading, fumigating, and mixing are included. Cracking, grinding, crushing, or milling are not included. The manufacture of animal feeds and the manufacture of straw paper from wheat straw are also not included.

4. *Nuts.*—Sizing, grading, sorting, and cleaning the unshelled nuts are included. Cracking, picking, shelling, or roasting the nuts and cleaning, sorting, and roasting the nut meats or manufacturing them into peanut butter are not included.

5. *Tobacco.*—Stripping, i. e., pulling the tobacco leaves from the stalk, tying the tobacco leaves into hands, grading, and sorting are included.

6. *Wool.*—Cleaning and grading are included. Curing is not included.

7. *Fur.*—Cleaning the raw fur is included.

8. *Hemp.*—Decortication is not included.

9. *Nursery stock.*—Cleaning and grading are included.

### Canning

34. The term "canning" is commonly understood to mean hermetically sealing and sterilizing or pasteurizing. Such sterilization or pasteurization is an integral part of the canning process. The term includes the necessary preparatory operations performed on agricultural or horticultural commodities before the commodities are placed in bottles, cans, or other hermetically sealed containers, as well as those of physically transferring the commodities to the bottles, cans, etc. These operations may include all types of preparations of the product such as heating, cooking, peeling, squeezing, cutting, cleaning, mixing, etc. Sealing or labeling the cans, as well as placing the cans in cases or boxes, are also included.

The canning of marmalade, chili, tamales, meat products, poultry products, vinegar, beer, etc., is not an exempt operation, however, for at least a substantial part of the ingredients used in such canning are not agricultural commodities within the meaning of section 13 (a) (10). (See par. 25, fourth.)

### Making Cheese or Butter or Other Dairy Products

35. According to the "Agricultural Statistics—1938" of the United States Department of Agriculture, the following constitute the vast bulk of milk and dairy products produced in this country:

Fluid milk.

Cream.

Skimmed milk.

Whey.

Buttermilk.

Sour milk or cream.

Creamery butter.

Whey butter (made from whey cream).

Renovated or process butter.

American cheese:

Whole milk.

Part skim.

Full skim.

Swiss cheese (including block).

Brick and Munster cheese.

Limburger cheese.

Cream and Neufchatel cheese.

All Italian varieties of cheese.

All other varieties of cheese.

Cottage, pot, and bakers' cheese.

Condensed milk (sweetened):

Case goods:

Skimmed.

Unskimmed.

Bulk goods:

Skimmed.

Unskimmed.



Unsweetened condensed milk (plain condensed):	Dried or powdered buttermilk.
Bulk goods:	Dried or powdered whole milk.
Skimmed.	Dried or powdered skim milk.
Unskimmed.	Dried or powdered cream.
Evaporated milk (unsweetened):	Dried casein (skim-milk or buttermilk product).
Case goods:	Wet casein.
Skimmed.	Malted milk.
Unskimmed.	Milk sugar (crude).
Concentrated skimmed milk.	Ice cream of all kinds.
Condensed or evaporated buttermilk.	

The operations performed in preparing and making the foregoing products and placing them in containers are included in the term "making cheese or butter or other dairy products."

The term does not include, however, the processing of casein, for that is not the making of a dairy product. Nor does the term include the sorting, printing, wrapping, packing, and storing of butter or cheese which is bought in bulk by dealers from creameries. That does not seem to be "making \* \* \* butter."

### Other Nonexempt Operations

36. Some other operations, which, in our opinion, are not included within the exemption provided by section 13 (a) (10), are the making of cigars, cigarettes, plug, chewing, or pipe tobacco, the slaughtering, picking or dressing of poultry, the slaughtering or dressing of livestock, the grinding of sugarcane, the roasting of coffee, and the manufacture of potato starch and potato flour.

### Employees Engaged in Both Exempt and Nonexempt Operations

37. Questions have been presented as to whether an employee who devotes part of his time to an activity described in this section and part of his time to a nonexempt operation is entitled to the benefit of the exemption. It is our opinion that in such case the employee is not entitled to the exemption. Of course, if the employee is engaged in certain workweeks in only the exempt operation, he is entitled to the exemption during such workweeks.

### Manufacture of Packages or Containers

38. The manufacture of packages or containers used in the shipment of agricultural or horticultural commodities is not among the practices described in either section 7 (c) or section 13 (a) (10), regardless of how necessary such manufacture may be to the distribution of the commodities mentioned in said sections. An amendment to the act, which was introduced on the floor of the House, designed to exempt the employees engaged in such manufacture, was rejected.



# REGULATIONS ON HOW TO KEEP WAGE AND HOUR RECORDS

Under the  
Fair Labor Standards Act of 1938

Title 29, Chapter 5, Code of Federal Regulations  
Part 516

*Effective September 15, 1941*

*Amended April 1, 1944*



Section 516.2 (page 5) shows employers how to keep records on employees entitled to the minimum wage and to overtime after 40 hours a week. Most of the other sections deal with the keeping of records under exemptions from the Act.

Record-keeping regulations on exemption of executives and others may be found on p. 10. Attention is called to Section 516.14, "Length of Time Records Shall be Preserved," on p. 14.

U. S. DEPARTMENT OF LABOR

*Wage and Hour Division*

These regulations repeal and supersede all regulations previously issued on records to be kept by employers pursuant to Section 11 (c) of the Fair Labor Standards Act.

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# I. GENERAL REQUIREMENTS

## Section 516.1

### RECORDS

(a) No particular order or form of records is prescribed by these Regulations. Every employer subject to any provisions of the Fair Labor Standards Act or of any order issued under this Act shall, however, make and keep records containing the information and data on persons in his employ and their wages, hours, and other conditions and practices of employment as provided in any of the applicable sections 516.2 through 516.13 of these Regulations. Every employer shall preserve his records for the periods of time and under the conditions provided in sections 516.14 through 516.16. As provided in section 516.17, every employer shall submit such reports and make such extension, recomputation, or transcription of those records as the Administrator or his duly authorized and designated representative may require.

(b) <sup>1</sup>In addition to keeping other records required by the regulations, an employer who

makes deductions from the wages of his employees for "board, lodging, or other facilities" (as these terms are used in section 3 (m) of the Act) furnished to them by the employer or by an affiliated person, or who furnishes such "board, lodging, or other facilities" to his employees as an addition to wages, shall maintain and preserve records substantiating the cost of furnishing each class of facility.<sup>2</sup> Such records shall include itemized accounts showing the nature and amount of any expenditures entering into the computation of the reasonable cost as defined in section 531.1 of the Regulations, Part 531, and shall contain the data required to compute the amount of the depreciated investment in any assets allocable to the furnishing of the facilities, including the date of acquisition or construction, the original cost, the rate of depreciation and the total amount of accumulated depreciation on such assets.<sup>4</sup>

<sup>1</sup> Amendment effective April 1, 1944. This record-keeping requirement has been approved by the Bureau of the Budget in accordance with the Federal Reports Act of 1942.

<sup>2</sup> Separate records of the cost of each item furnished to an employee need not be kept. The requirement may be met by keeping combined records of the costs incurred in furnishing each class of facility, such as housing, fuel, or merchandise furnished through a company store or commissary. Thus, in the case of an employer who furnishes housing, separate cost records need not be kept for each house. The cost of maintenance and repairs for all the houses may be shown together. Original cost and depreciation records may be kept for groups of houses acquired at the same time. Costs incurred in furnishing similar or closely related facilities, moreover, may be shown in combined records. For example, if joint costs are incurred in furnishing both housing and electricity and the records are not readily separable, the housing and electricity together may be treated as a "class" of facility for record-keeping purposes. Merchandise furnished at a company store may be considered as a "class" of facility and the records may show the cost of the operation of the store as a whole, or records of the cost of furnishing the different kinds of merchandise may be maintained separately. Where cost records are kept for a "class" of facility rather than for each individual article furnished to employees, the records must also show the gross income derived from each such class of facility; i. e., gross rentals in the case of houses, total sales through the store or commissary, total receipts from sales of fuel, etc.

<sup>3</sup> No particular degree of itemization is prescribed. The amount of detail shown in these accounts should be consistent with good accounting practices, and should be sufficient to enable the Administrator or his representative to verify the nature of the expenditure and the amount by reference to the basic records which must be preserved pursuant to section 516.15 (c) (3).

<sup>4</sup> If the assets include merchandise held for sale to employees, the records should contain data from which the average net investment in inventory can be determined.



## II. EMPLOYEE INFORMATION AND DATA TO BE CONTAINED IN EMPLOYERS' RECORDS

### Section 516.2

#### Employees Subject to Minimum Wage and 40-Hour Week Overtime Provisions—Sections 6 and 7 (a)

(a) *Items Required.* "Every employer shall maintain and preserve<sup>1</sup> payroll or other records containing the following information and data on each and every employee to whom both Sections 6 and 7 (a) of the Fair Labor Standards Act apply.<sup>2</sup>

(1) Name in full,<sup>3</sup>

(And on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records)

(2) Home address,

(3) Date of birth if under 19,

(4) Occupation in which employed,

(5) Time of day and name of the day on which the employee's workweek begins,<sup>4</sup>

(6) (i) Regular hourly rate of pay,<sup>5</sup> and (ii) Basis on which wages are paid,<sup>6</sup>

(7) Hours worked each workday<sup>7</sup> and total hours worked each workweek,

(8) Total daily or weekly straight-time earnings or wages<sup>8</sup>

(9) Total weekly overtime excess compensation,<sup>9</sup>

(10) Total additions to or deductions from wages paid each pay period,<sup>10</sup>

(11) Total wages paid each pay period,

(12) Date of payment and the pay period covered by payment.

<sup>1</sup>For the period records must be preserved, see sections 516.14 and 516.15, p. 14.

<sup>2</sup>For additional requirements on certain types of employees covered by more than one minimum hourly wage set by one or more wage orders, see section 516.8, p. 11.

For additional requirements on *Learners, Apprentices, Messengers, and Handicapped Workers under Special Certificates*, see section 516.9, p. 11.

For additional requirements on *Employees dependent upon tips or gratuities as a part of wages*, see section 516.10, p. 12.

For requirements on *Industrial Homeworkers*, see section 516.11, p. 12.

<sup>3</sup>This shall be the same name as that used for Social Security record purposes.

<sup>4</sup>If the employee is a part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice. If, however, any employee or group of employees has a workweek beginning and ending at a different time, a separate notation shall then be kept for that employee or group of employees.

<sup>5</sup>This item is only required to be entered in the records for any week when overtime is worked and overtime excess compensation is due under Section 7 (a). When required, it shall be shown as the *hourly rate* of any employee whose total straight-time earnings or wages are derived from one fixed hourly rate throughout the workweek, or the *average hourly earnings*, as determined in accordance with paragraph 7 of Interpretative Bulletin No. 4, for any employee employed on any other basis.

<sup>6</sup>This may be shown as "50¢ hr."; "\$3.00 a day"; "\$3.20, 8 hr. day"; "\$15.00 wk."; "\$15.00, 40 hr. wk."; "\$150 mo."; "piece rates"; "piece rates and bonus."

<sup>7</sup>A "workday" with respect to any employee shall be any consecutive 24 hours.

<sup>8</sup>That is: The total earnings or wages due for hours worked during the workday or workweek, including all earnings or wages due during any overtime worked, but exclusive of overtime excess compensation.

<sup>9</sup>That is: The excess compensation for overtime worked which amount is over and above all straight-time earnings or wages also earned during overtime worked. For the basis to be used in determining overtime payments under the Fair Labor Standards Act, see Interpretative Bulletin No. 4.

<sup>10</sup>As to the effect of additions or deductions upon the regular hourly rate of pay, see Interpretative Bulletin No. 3. For the basis on which deductions or additions for board, lodging, or other facilities may be made and their cost to the employer determined, attention is called to Regulation Part 531, "Regulations Determining the Reasonable Cost of Board, Lodging, and Other Facilities."

If the additions to or deductions from wages paid (1) so affect the total cash wages due in any workweek (even though the employee actually is paid semimonthly) as to result in the employee receiving less in cash than the minimum hourly wage provided in Section 6 or in an applicable wage order, or (2) if the employee works in excess of 40 hours a week and (a) any additions to the wages paid are a part of that employee's wages, or (b) any deductions made are claimed as allowable deductions under Section 3 (m) of the Act, the employer shall then maintain records showing those additions to or deductions from wages paid on a workweek basis. (For legal deductions not claimed under Section 3 (m) and which need not be maintained on a workweek basis, see Paragraphs 15 through 17 of Interpretative Bulletin No. 3 Rev. October 1940.)

Every employer making additions or deductions shall also maintain in individual employee accounts a record of those types of items, and their separate credited or debited amounts, which compose the additions to or deductions from wages paid as well as specifying dates involved. For example:

6/5—coal, ½ ton	\$4.00
6/9—groceries	4.48
6/12—meat	1.20
6/16-6/22—house rent (wk.)	3.50
6/16-6/22—board and lodging (wk.)	6.00

For the period these and other records pertaining to debits and credits shall be preserved, see section 516.15 (c), p. 14.

### Section 516.3

#### Employees Under Certain Union Agreements Who Are To Be Paid for Overtime Over 12 Hours a Day or 56 Hours a Week as Provided in Section 7 (b) (1) or 7 (b) (2) <sup>1</sup>

(a) *Items Required.* Every employer of employees who are employed:

1. In pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that no employee shall be employed more than one thousand hours during any period of twenty-six consecutive weeks, or

2. On an annual basis in pursuance of an agreement made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board, which provides that the employee shall not be employed more than two thousand hours during any period of 52 consecutive weeks, shall maintain and preserve<sup>2</sup> payroll or other records containing the following information and data on each and every employee to whom Section 6 (minimum hourly

wages) of the Fair Labor Standards Act applies and who, as a result of such agreement or amendment thereto, is employed in accordance with Section 7 (b) (1) or 7 (b) (2) of the Act (overtime excess compensation for employment over 12 hours a day or 56 hours a week) <sup>3</sup>

(1) Name in full,<sup>4</sup>

(And on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records)

(2) Home address,

(3) Date of birth if under 19,

(4) Occupation in which employed,

(5) Time of day and name of the day on which the employee's workweek begins,<sup>5</sup>

(6) (i) Regular hourly rate of pay,<sup>6</sup> and (ii) Basis on which wages are paid,<sup>7</sup>

(7) Hours worked each workday,<sup>8</sup> and total hours worked each workweek,

(8) Total daily or weekly straight-time earnings or wages,<sup>9</sup>

(9) Daily and weekly overtime excess compensation,<sup>10</sup>

(10) Total additions to or deductions from wages paid each pay period,<sup>11</sup>

(11) Total wages paid each pay period,

(12) Date of payment and the pay period covered by payment.

<sup>1</sup> For an interpretation of these two sections of the Act, see Interpretative Bulletin No. 8, *Collective Bargaining Agreements Under Section 7 (b) (1) and Section 7 (b) (2) of the Fair Labor Standards Act of 1938*.

<sup>2</sup> For the period records must be preserved, see sections 516.14 and 516.15, p. 14.

<sup>3</sup> For additional requirements on certain types of employees covered by more than one minimum hourly wage set by one or more Wage Orders, see section 516.8, p. 11.

<sup>4</sup> For additional requirements on Learners, Apprentices, Messengers, and Handicapped Workers Under Special Certificates, see section 516.9, p. 11.

<sup>5</sup> This shall be the same name as that used for Social Security record purposes.

<sup>6</sup> If the employee is a part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice. If, however, any employee or group of employees has a workweek beginning and ending at a different time, a separate notation shall then be kept for that employee or group of employees.

<sup>7</sup> This item is only required to be entered in the records for any week when overtime is worked and overtime excess compensation is due under either Section 7 (b) (1) or 7 (b) (2) of the Act. When required, it shall be shown as the hourly rate of any employee whose total straight-time earnings or wages are derived from one fixed hourly rate throughout the workweek, or the average hourly earnings, as determined in accordance with Paragraph 7 of Interpretative Bulletin No. 4, for any employee employed on any other basis.

<sup>8</sup> This may be shown as "50¢ hr."; "\$3.00 a day"; "\$3.20, 8-hr. day"; "\$15.00 wk."; "\$15.00, 40-hr. wk."; "\$150 mo."; "piece rates"; "piece rates and bonus."

<sup>9</sup> A "workday" with respect to any employee shall be any consecutive 24 hours. If the employee works less than 12 hours a day, notation of the beginning and ending time of each compensable workperiod during the day will suffice. If the employee works in excess of 12 hours on any day, the total hours worked shall then be shown for that day.

<sup>10</sup> That is: The total earnings or wages due for hours worked during the workday or workweek, including all earnings or wages due during any overtime worked, but exclusive of overtime excess compensation.

<sup>11</sup> That is: The excess compensation for overtime worked which amount is over and above all straight-time earnings or wages also earned during overtime worked. For the basis to be used in determining overtime payments under Section 7 (b) of the Fair Labor Standards Act, see Interpretative Bulletin No. 4, particularly Paragraph 72.

<sup>12</sup> As to the effect of additions or deductions upon the regular hourly rate of pay, see Interpretative Bulletin No. 3. For the basis on which deductions or additions for board, lodging, or other facilities may be made and their cost to the employer determined, attention is called to Regulations Part 531, "Regulations, Determining the Reasonable Cost of Board, Lodging, and Other Facilities."

If the additions to or deductions from wages paid (1) so affect the total cash wages due in any workweek (even though the employee actually is paid semimonthly), as to result in the employee receiving less in cash than the minimum hourly wage provided in Section 6 or in an applicable wage order, or (2) if the employee works in excess of 12 hours a day or 56 hours a week and (a) any additions to the wages paid are a part of that employee's wages or (b) any deductions made are claimed as allowable deductions under Section 3 (m) of the Act, the employer shall then maintain records showing those additions to or deductions from wages paid on a workweek basis. (For legal deductions not claimed under Section 3 (m) and which need not be maintained on a workweek basis see Paragraphs 15 through 17 of Interpretative Bulletin No. 3 Rev. October 1940.)

Every employer making additions or deductions shall also maintain in individual employee accounts a record of those types of items, and their separate credited or debited amounts, which compose the additions to or deductions from wages paid as well as specifying dates involved. For example:

6/5 — coal, 1/2 ton	\$4.00
6/9 — groceries	4.48
6/12 — meat	1.20
6/16-6/22 — house rent (wk.)	3.50
6/16-6/22 — board and lodging (wk.)	6.00

For the period these and other records pertaining to debits and credits shall be preserved, see section 516.15 (c), p. 14.



(b) *Submission of Copy of Agreement to Washington.* The employer shall also report and file with the Administrator at Washington, D. C., within 30 days after such collective bargaining agreement has been made, a copy of each such collective bargaining agreement. Likewise, a copy of each amendment or addition thereto shall be reported and filed with the Administrator at Washington, D. C., within thirty days after such amendment or addition has been agreed upon.

(c) *Record of Persons and Periods Employed Under Agreements.* Every employer shall also make, keep, and preserve a record, either separately or as a part of the pay roll:

- (1) Listing each and every employee employed pursuant to each such collective bargaining agreement and each amendment and addition thereto
- (2) Indicating the period or periods during which the employee, pursuant to an agreement, has been or is employed for either, (a) not more than 1,000 hours during any period of 26 consecutive weeks, or (b) on an annual basis and for not more than 2,080 hours during any period of 52 consecutive weeks, and
- (3) Showing the total hours worked during any period of 26 consecutive weeks, if employed in accordance with Section 7 (b) (1), or during each period of 52 consecutive weeks, if employed in accordance with Section 7 (b) (2).

## Section 516.4

Employees Subject to Minimum Wage (Section on 6) and Overtime Provisions Covering "Seasonal Industries" as Provided in Section 7 (b) (3) <sup>1</sup>

(a) *Items Required.* Every employer shall maintain and preserve<sup>2</sup> pay-roll or other records containing the following information and data on each and every employee to whom Section 6 and Section 7 (b) (3) of the Fair Labor Standards Act apply:<sup>3</sup>

- (1) Name in full,<sup>4</sup>

(And on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or pay-roll records)

- (2) Home address,
- (3) Date of birth if under 19,
- (4) Occupation in which employed,
- (5) Time of day and name of the day on which the employee's workweek begins,<sup>5</sup>
- (6) (i) Regular hourly rate of pay,<sup>6</sup> and (ii) Basis on which wages are paid,<sup>7</sup>
- (7) Hours worked each workday,<sup>8</sup> and total hours worked each workweek,
- (8) Total daily or weekly straight-time earnings or wages,<sup>9</sup>
- (9) (i) Daily and weekly overtime excess compensation<sup>10</sup> during the weeks the establishment operates under the 14 workweek partial overtime exemption, and (ii) Total weekly overtime excess compensation<sup>10</sup> during the remaining weeks of the calendar year,
- (10) Total additions to or deductions from wages paid each pay period,<sup>11</sup>

<sup>1</sup>For industries found to be "of a seasonal nature," see Part 526, *Regulations Applicable to Industries of a Seasonal Nature.*

<sup>2</sup>For the period records must be preserved, see sections 516.14 and 516.15, p. 14.

<sup>3</sup>For additional requirements on certain types of employees covered by more than one minimum hourly wage set by one or more Wage Orders, see section 516.8, p. 11.

<sup>4</sup>For additional requirements on Learners, Apprentices, Messengers, and Handicapped Workers Under Special Certificate, see section 516.9, p. 11.

<sup>5</sup>This shall be the same name as that used for Social Security record purposes.

<sup>6</sup>If the employee is a part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice. If, however, any employee or group of employees has a workweek beginning and ending at a different time, a separate notation shall then be kept for that employee or group of employees.

<sup>7</sup>This item is only required to be entered in the records for any week when overtime is worked and overtime excess compensation is due under an applicable part of Section 7 of the Act. When required it shall be shown as the hourly rate of any employee whose total straight-time earnings or wages are derived from one fixed hourly rate throughout the workweek, or the average hourly earnings, as determined in accordance with Paragraph 7 of Interpretative Bulletin No. 4, for any employee employed on any other basis.

<sup>8</sup>This may be shown as "50¢ hr."; "\$3.00 a day"; "\$3.20, 8 hr. day"; "\$15.00 wk."; "\$15.00, 40 hr. wk."; "\$150 mo."; "piece rates"; "piece rates and bonus."

<sup>9</sup>A "workday" with respect to any employee shall be any consecutive 24 hours. If the employee works less than 12 hours a day during any of the 14 workweeks referred to in Section 7 (b) (3), notation of the beginning and ending time of each compensable work period during the day will suffice. If the employee works in excess of 12 hours in any such day, the total hours worked shall then be shown for that day.

<sup>10</sup>That is: The total earnings or wages due for hours worked during the workday or workweek, including all earnings or wages due during any overtime worked, but exclusive of overtime excess compensation.

<sup>11</sup>That is: The excess compensation for overtime worked which amount is over and above all straight-time earnings or wages also earned during overtime worked. For the basis to be used in determining overtime payments under the Fair Labor Standards Act, see Interpretative Bulletin No. 4.

<sup>12</sup>As to the effect of additions or deductions upon the regular hourly rate of pay, see Interpretative Bulletin No. 3. For the basis on which deductions or additions for board, lodging, or other facilities may be made and their cost to the employer determined, attention is called to Regulations Part 531, "Regulations, Determining the Reasonable Cost of Board, Lodging, and Other Facilities."

- (11) Total wages paid each pay period,  
 (12) Date of payment and the pay period covered by payment.

(b) *Establishment Operation Records.* Every employer shall also note in his records the beginning and ending of each workweek during which the establishment operates under the 14 workweek exemption provided in Section 7 (b) (3).

(c) *Posting of Notice of Weeks Taken Under the 14 Workweek Exemption.* (1) In addition every employer shall prepare a legible typewritten or handwritten (in ink) Notice reading:

**"Notice—Overtime Payments:**

"This establishment has taken the workweek (or workweeks) in this pay period as a part of the 14 workweeks permitted under Section 7 (b) (3) when overtime, at a rate of not less than time and one-half the regular hourly rate, need only be paid for any hours worked over 12 hours a day and 56 hours a week.

"This week (or these weeks) in this pay period completes the \_\_\_\_\_ week of the permissible 14 workweeks."

Date \_\_\_\_\_ Signed \_\_\_\_\_

(2) On the date when employees are paid off for any pay period involving a week or weeks during which the establishment operates under the 14 workweek partial overtime exemption (from Section 7 (a)) provided in Section 7 (b) (3), the employer shall promi-

nently post that Notice beside the pay window or the person paying off the employees during all the time employees are being paid. Before posting the Notice the employer shall fill in the blank space in the second paragraph of the Notice with the number of weeks which the establishment has then completed of the 14 permissible workweeks.

**Section 516.5**

**Employees of Employers Operating Under the 14 Workweek Total Exemption From Section 7 (a) Provided by Section 7 (c)**

(a) *Items Required.* Every employer operating under the complete exemption from Section 7 (a) for 14 workweeks of the calendar year as provided in Section 7 (c) of the Fair Labor Standards Act<sup>1</sup> and under Section 7 (a) for the remainder of the calendar year shall maintain and preserve<sup>2</sup> payroll or other records containing the following information and data on each and every employee to whom the provisions of Sections 6 and 7 of the Fair Labor Standards Act apply:<sup>3</sup>

- (1) Name in full,<sup>4</sup>

(And on the same records, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records)

- (2) Home address,

- (3) Date of birth if under 19,

- (4) Occupation in which employed,

- (5) Time of day and name of the day on which the employee's workweek begins,<sup>5</sup>

If the additions to or deductions from wages paid (1) so affect the total cash wages due in any workweek (even though the employee actually is paid semimonthly) as to result in the employee receiving less in cash than the minimum hourly wage provided in Section 6 or in an applicable wage order, or (2) if the employee works in excess of 40 hours a week during any period the 14 workweek partial overtime exemption is not applicable or in excess of 12 hours a day or 56 hours a week during any period the 14 workweek partial exemption is in effect and (a) any additions to the wages paid are a part of that employee's wages, or (b) any deductions made are claimed as allowable deductions under Section 3 (m) of the Act, the employer shall then maintain records showing those additions to or deductions from wages paid, on a workweek basis. (For legal deductions not claimed under Section 3 (m) and which need not be maintained on a workweek basis, see Paragraphs 15 through 17 of Interpretative Bulletin No. 3 Rev. October 1940.)

Every employer making additions or deductions shall also maintain in individual employee accounts a record of those types of items, and their separate credited or debited amounts, which compose the additions to or deductions from wages paid as well as specifying dates involved. For example:

6/5 — coal, 1/2 ton	\$4.00
6/9 — groceries	4.48
6/12 — meat	1.20
6/16-6/22 — house rent (wk.)	3.50
6/16-6/22 — board and lodging (wk.)	6.00

For the period these and other records pertaining to debits and credits shall be preserved, see section 516.15 (c), p. 14.

<sup>1</sup>This section relates to the data and information required to be kept by employers in their records on employees to whom is applicable that part of Section 7 (c) of the Act which reads:

"In the case of an employer engaged in the first processing of, or in canning or packing, perishable or seasonal fresh fruits or vegetables, or in the first processing, within the area of production (as defined by the Administrator), of any agricultural or horticultural commodity during seasonal operations, or in handling, slaughtering, or dressing poultry or livestock, the provisions of subsection 7 (a), during a period or periods of not more than fourteen workweeks in the aggregate in any calendar year, shall not apply to his employees in any place of employment where he is engaged."

For the Administrator's definition of the "area of production," see Part 536, *Regulations Defining the term "Area of Production" as used in Section 7 (c) and in Section 13 (a) (10) of the Fair Labor Standards Act.*

<sup>2</sup>For the period records must be preserved, see sections 516.14 and 516.15, p. 14.

<sup>3</sup>For additional requirements on certain types of employees covered by more than one minimum hourly wage set by one or more Wage Orders, see section 516.8, p. 11.

For additional requirements on Learners, Apprentices, Messengers, and Handicapped Workers Under Special Certificates, see section 516.9, p. 11.

<sup>4</sup>This shall be the same name as that used for Social Security record purposes.

<sup>5</sup>If the employee is a part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice. If, however, any employee or group of employees has a workweek beginning and ending at a different time, a separate notation shall then be kept for that employee or group of employees.



(6) (i) Regular hourly rate of pay,<sup>6</sup> and (ii) Basis on which wages are paid,<sup>7</sup>

(7) Hours worked each workday,<sup>8</sup> and total hours worked each workweek,

(8) Total daily or weekly straight-time earnings or wages,<sup>9</sup>

(9) Total weekly overtime excess compensation for the weeks to which Section 7 (a) is applicable.<sup>10</sup>

(10) Additions to or deductions from wages paid each pay period,<sup>11</sup>

(11) Total wages paid each pay period,

(12) Date of payment and pay period covered by payment.

(b) *Establishment Operation Record.* Every employer shall also note in his records the beginning and ending of each workweek during which the establishment operates under the 14 workweek exemption provided in Section 7 (c).

(c) *Posting of Notice of Weeks Taken Under 14 Workweek Exemption.* (1) In addition, every employer shall prepare a legible typewritten or handwritten (in ink) Notice reading:

"Notice—Overtime Payments:

"This establishment has taken the workweek (or workweeks) in this pay period as a part of the 14 workweeks permitted under Section 7 (c) during which overtime excess compensation, as

provided in Section 7 (a), is not due for overtime worked.

"This week (or these weeks) in this pay period completes the ——— week of the permissible 14 workweeks.

Date \_\_\_\_\_ Signed \_\_\_\_\_

(2) On the date when employees are paid off for any period involving a week or weeks during which the establishment operates under the 14 workweek total overtime exemption provided in Section 7 (c), the employer shall prominently post that Notice beside the pay window or the person paying off the employees during all the time employees are being paid. Before posting the notice the employer shall fill in the blank space in the second paragraph of the notice with the number of weeks which the establishment has then completed of the 14 permissible workweeks.

## Section 516.6

**Employees Totally Exempt From Overtime Payment Pursuant to Part of Section 7 (c) and Sections 13 (b) (1) and 13 (b) (2)<sup>1</sup>**

(a) *Items Required.* Every employer shall maintain and preserve<sup>2</sup> payroll or other records containing the following information and

<sup>6</sup>This item is only required to be entered in the records for any week when overtime is worked and overtime excess compensation is due under Section 7 (a). When required, it shall be shown as the hourly rate of any employee whose total straight-time earnings or wages are derived from one fixed hourly rate throughout the workweek, or the average hourly earnings, as determined in accordance with Paragraph 7 of Interpretative Bulletin No. 4, for any employee employed on any other basis.

<sup>7</sup>This may be shown as "50¢ hr."; "3.00 a day"; "\$3.20, 8 hr. day"; "\$15.00 wk."; "\$15.00, 40 hr. wk."; "\$150 mo."; "piece rates"; "piece rates and bonus."

<sup>8</sup>A "workday" with respect to any employee shall be any consecutive 24 hours.

<sup>9</sup>That is: The total earnings or wages due for hours worked during the workday or workweek, including all earnings or wages due during any overtime worked, but exclusive of overtime excess compensation.

<sup>10</sup>That is: The excess compensation for overtime worked which amount is over and above all straight-time earnings or wages also earned during overtime worked. For the basis to be used in determining overtime payments under the Fair Labor Standards Act, see Interpretative Bulletin No. 4.

<sup>11</sup>As to the effect of additions or deductions upon the regular hourly rate of pay, see Interpretative Bulletin No. 3. For the basis on which deductions or additions for board, lodging, or other facilities may be made and their cost to the employer determined, attention is called to Regulations Part 531, "Regulations Determining the Reasonable Cost of Board, Lodging, and Other Facilities."

If the additions to or deductions from wages paid (1) so affect the total cash wages due in any workweek (even though the employee actually is paid semimonthly) as to result in the employee receiving less in cash than the minimum hourly wage provided in Section 6 or in an applicable Wage Order, or (2) if during any period the 14 workweek overtime exemption is not applicable the employee works in excess of 40 hours a week and (a) any additions to the wages paid are a part of that employee's wages, or (b) any deductions made are claimed as allowable deductions under Section 3 (m) of the Act, the employer shall then maintain records showing those additions to or deductions from wages paid, on a workweek basis. (For legal deductions not claimed under Section 3 (m) and which need not be maintained on a workweek basis see Paragraphs 15 through 17 of Interpretative Bulletin No. 3 Rev. October 1940.)

Every employer making additions or deductions shall also maintain in individual employee accounts a record of those types of items, and their separate credited or debited amounts, which compose the additions to or deductions from wages paid as well as specifying dates involved. For example:

6/5 — coal, ½ ton	-----	\$4.00
6/9 — groceries	-----	4.48
6/12 — meat	-----	1.20
6/16-6/22 — house rent (wk.)	-----	3.50
6/16-6/22 — board and lodging (wk.)	-----	6.00

For the period these and other records pertaining to debits and credits shall be preserved, see section 516.15 (c), p. 14.

<sup>1</sup>This section relates to the record data and information required to be kept by employers on employees to whom is applicable:

(1) That part of Section 7 (c) reading: "In the case of an employer engaged in the first processing of milk, whey, skimmed milk, or cream into dairy products, or in the ginning and compressing of cotton, or in the processing of cottonseed, or in the processing of sugar, beets, sugar beet molasses, sugarcane, or maple sap, into sugar (but not refined sugar), or into syrup, the provisions of subsection 7 (a) shall not apply to his employees in any place of employment where he is so engaged," or

(2) Section 13 (b) (1) or 13 (b) (2) of the Act.

(For an explanation of Section 13 (b) (1), insofar as certain employees of motor carriers are concerned, see Interpretative Bulletin No. 9.)

<sup>2</sup>For the period records must be preserved, see sections 516.14 and 516.15, p. 14.

data on each and every employee to whom Section 6 of the Fair Labor Standards Act applies but Section 7 (a) or 7 (b) does not apply.<sup>3</sup>

(1) Name in full,<sup>4</sup>

(And on the same record the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records)

(2) Home address,

(3) Date of birth if under 19,

(4) Occupation in which employed,

(5) Time of day and name of the day on which the employee's workweek begins,<sup>5</sup>

(6) Basis on which wages are paid,<sup>6</sup>

(7) Hours worked each workday,<sup>7</sup> and total hours worked each workweek,

(8) Total daily or weekly earnings or wages,<sup>8</sup>

(9) Additions to or deductions from wages paid each pay period,<sup>9</sup>

(10) Total earnings or wages paid each pay period,

(11) Date of payment and pay period covered by payment.

## Section 516.7

### Bona Fide Executive, Administrative, Professional, Local Retail, Outside Sales Employees as Referred to in Section 13 (a)

(1)<sup>1</sup>

(a) *Items Required.* Every employer shall

maintain and preserve<sup>2</sup> payroll or other records containing the following information and data on each and every employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman as defined in Part 541, *Regulations defining and delimiting the terms "Any Employee Employed in a Bona Fide Executive, Administrative, Professional, or Local Retailing Capacity or in the Capacity of Outside Salesman"*;

(1) Name in full,<sup>3</sup>

(And on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records)

(2) Home address,

(3) Date of birth if under 19,

(4) Occupation in which employed,

(5) Time of day and name of the day on which the employee's workweek begins,<sup>4</sup>

(6) Basis on which wages are paid,<sup>5</sup>

(7) Total wages paid each pay period,

(8) Date of payment and pay period covered by payment.

<sup>3</sup> For additional requirements on certain types of employees covered by more than one minimum hourly wage set by one or more wage orders, see section 516.8, p. 11.

For additional requirements on learners, apprentices, messengers, and handicapped workers under special certificates, see section 516.9, p. 11.

For additional requirements on employees dependent upon tips or gratuities as a part of wages, see section 516.10, p. 12.

<sup>4</sup> This shall be the same name as that used for Social Security record purposes.

<sup>5</sup> If the employee is a part of a workforce or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole workforce or establishment will suffice. If, however, any employee or group of employees has a workweek beginning and ending at a different time, a separate notation shall then be kept for that employee or group of employees.

<sup>6</sup> This may be shown as "50¢ hr."; "\$3.00 a day"; "\$3.20, 8 hr. day"; "\$13.00 wk."; "\$15.00, 40 hr. wk."; "\$150 mo."; "piece rates"; "piece rates and bonus."

<sup>7</sup> A "workday" with respect to any employee shall be any consecutive 24 hours.

<sup>8</sup> That is: The total earnings or wages due for all hours worked during the workday or workweek.

<sup>9</sup> As to the effect of additions or deductions upon the regular hourly rate of pay, see Interpretative Bulletin No. 3. For the basis on which deductions or additions for board, lodging, or other facilities may be made and their cost to the employer determined, attention is called to Regulations Part 531, "Regulations Determining the Reasonable Cost of Board, Lodging, and other Facilities."

If the additions to or deductions from wages paid in any way so affect the total cash wages due in any workweek (even though actually paid semi-monthly) as to result in the employee receiving less in cash than the minimum hourly wage, provided in Section 6 or in an applicable wage order, the employer shall then maintain records showing those additions to or deductions from wages paid on a workweek basis. (For legal deductions not required on workweek basis, Paragraphs 15-17, Interpretative Bulletin No. 3 Rev. October 1940.)

Every employer making additions or deductions shall also maintain in individual employee accounts a record of those types of items, and their separate credited or debited amount, which compose the additions to or deductions from wages paid as well as specifying dates involved. For example:

6/6 — coal, $\frac{1}{2}$ ton	24.00
6/9 — groceries	4.48
6/12 — meat	1.20
6/16-6/22 — house rent (wk.)	3.50
6/16-6/22 — board and lodging (wk.)	6.00

For the period these and other records pertaining to debits and credits shall be preserved, see section 516.15 (c), p. 14.

<sup>1</sup> This section relates to the record data and information required to be kept by employers on employees to whom Section 13 (a) (1) of the Act applies.

<sup>2</sup> For the period records must be preserved, see sections 516.14 and 516.15, p. 14.

<sup>3</sup> This shall be the same name as that used for Social Security record purposes.

<sup>4</sup> If the employee is a part of a work force or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole work force or establishment will suffice. If, however, any employee or group of employees has a workweek beginning and ending at a different time, a separate notation shall then be kept for that employee or group of employees.

<sup>5</sup> This may be shown as "\$200 mo."; "\$50 wk."; or "on fee."



## Section 516.8

### *Employees Under More Than One Minimum Hourly Rate Fixed by Wage Orders*

(a) *Additional Items Required.* An employer of any employees subject to different minimum wage rates of pay one or more of which has been established by a Wage Order, who elects to pay less than an amount arrived at by applying the highest applicable minimum rate for all hours worked in any workweek, shall, in addition to any employee information and data required to be kept on them by any previous applicable section of these Regulations, maintain and preserve payroll or other records containing the following information and data on each of those employees:

- (1) The minimum rate of pay required to be paid for each type of goods upon which each such employee has worked,
- (2) The total hours or fractions thereof worked each workweek on work covered by each different applicable minimum rate of pay,<sup>1</sup>
- (3) Each type of goods and products upon which the employee has worked at a different applicable minimum rate of pay,
- (4) The piece rate, if any, for each operation on each type of goods upon which the employee has worked at a different applicable minimum rate of pay and the number of pieces worked upon at such piece rates,
- (5) The total week's piece-work earnings, if any, on each type of goods and products upon which the employee has worked at different minimum rates of pay,
- (6) The lot number of each type of goods upon which the employee has worked,
- (7) The total wages due the employee at straight-time for the hours worked on each type of goods and products to which is applicable a different minimum rate of pay, including any amounts earned in excess of the applicable minimum rate of pay.

(b) *Continuity of Such Records.* Every employer who keeps records in accordance with the foregoing provisions must keep such rec-

ords continuously. If he ceases or fails to do so in any workweek he may not resume the keeping of such records in such detail for a period of at least two months after the cessation date and then only after written notice of such resumption has been given by him to the Wage and Hour Division.

(c) *Records of Workers Whose Work Cannot Be Segregated.* The foregoing provisions of Paragraphs (a) and (b) of section 516.8 shall not be construed to affect in any way the records to kept, or compensation to be paid employees whose activities cannot be segregated (such as clerical and maintenance employees), and who are, therefore, not subject to different minimum rates of pay.

## Section 516.9

### *Learners, Apprentices, Messengers, Handicapped Workers Under Special Certificates as Provided in Section 14<sup>2</sup>*

(a) *Items Required.* Every employer shall maintain and preserve pay-roll or other records containing the same information and data pertaining to learners, apprentices, messengers, and handicapped workers employed at subminimum hourly rates under special certificates as he is required to have under any of the previous sections of these Regulations applicable to other employees in those occupations.

(b) *Segregation on Pay-Roll and use of Identifying Symbol.* In addition, every employer shall segregate on his pay-roll or pay records the names and required information and data on those learners, apprentices, messengers, and handicapped workers employed under special certificates. A symbol or letter shall also be placed before each such name on the pay-roll or pay records indicating that that person is a "learner," "apprentice," "messenger," or "handicapped worker" employed under a special certificate.<sup>3</sup>

<sup>1</sup> These hours worked shall include time from the commencement of work on such type of goods until work is commenced on another type of goods, for which such employee must be paid at a different minimum rate of pay.

<sup>2</sup> Regulations pertaining to such types of persons are:

Part 522, *Regulations Applicable to the Employment of Learners and related Industry Learner Regulations*;

Part 521, *Regulations Applicable to the Employment of Apprentices*;

Part 523, *Regulations Applicable to the Employment of Messengers*.

Part 524, *Regulations Applicable to the Employment of Handicapped Persons*.

<sup>3</sup> For the period each special certificate shall be preserved, see section 516.14, p. 14.

## Section 516.10

### *"Red Caps" and Other Employees Dependent on Tips as Part of Wages*

(a) *Items Required.* Supplementary to the provisions of any previous section of these Regulations pertaining to the records to be kept on such employees, every employer shall also maintain and preserve<sup>1</sup> payroll or other records containing the following additional information and data on each and every employee employed in any occupation in the performance of which the employee receives tips or gratuities from third persons and which tips or gratuities are accounted for or turned over by the employee to the employer:

- (1) Actual total hours worked each workday in those occupations in the performance of which the employee receives tips or gratuities from third persons,
- (2) Actual total hours worked each workday in any other occupation,
- (3) Total daily or weekly straight-time earnings segregated according to:
  - (i) Time paid for under (1) above, and
  - (ii) Time paid for under (2) above,
  - (iii) Tips or gratuities received and accounted for or turned over by the employee to the employer.

## Section 516.11

### *Homeworkers*

Every employer who directly or indirectly distributes work to be performed by an industrial homemaker<sup>2</sup> shall maintain and preserve<sup>1</sup> payroll or other records containing the following information and data on each and every industrial homemaker engaged on work distributed directly by the employer or indirectly in his interest, excepting those homeworkers to whom Part 545, *Regulations Relating to Homeworkers in the Needlework Industries in Puerto Rico*, applies:

- (a) Name in full,<sup>3</sup>

(And on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records)

- (b) Home address,

- (c) Date of birth if under 19,

- (d) With respect to each lot of work issued:

- (1) Date and hour on which work is given out to worker, and amount of such work given out,
- (2) Date and hour on which work is returned by worker, and amount of such work returned,
- (3) Kind of articles worked on and operations performed,
- (4) Piece rates paid,
- (5) Hours worked on each lot of work returned,
- (6) Wages paid for each lot of work returned,
- (7) Deductions for Social Security taxes,
- (8) Date of wage payment and pay period covered by payment,

- (e) With respect to each week:

- (1) Hours worked each week,
- (2) Wages earned for each week at regular piece rates;
- (3) Extra pay due each week for overtime worked,
- (4) Total wages earned each week,
- (5) Deductions for Social Security taxes,

- (f) With respect to the agent, distributor, or contractor:

- (1) Name and address of each agent, distributor, or contractor through whom homework is distributed and name and address of each homemaker to whom homework is distributed by each such agent, distributor, or contractor.

*Homework Handbooks.* In addition to the above information and data, a separate handbook (to be obtained by the employer from the Wage and Hour Division and supplied by him to each worker) shall be kept for each industrial homemaker employed in a home or outside a plant. The information required therein shall be entered by the employer or the person distributing homework on behalf of such employer each time work is given out to or received from an industrial homemaker. Except for the time necessary for the making of entries by the employer, the handbook must remain in the possession of the industrial homemaker until such time as the Wage and Hour Division may request it. *A separate record and a separate handbook shall be kept for each individual performing work in or about a home on any lot or amount of homework distributed.*

<sup>1</sup> For the period records must be preserved, see sections 516.14 and 516.15, p. 14.

<sup>2</sup> The term "industrial homemaker" means any person producing in or about a home, for an employer, goods from material furnished directly by or indirectly for such employer.

<sup>3</sup> This shall be the same name as that used for Social Security record purposes.



## Section 516.12

*Employees Affected by the Exemptions Provided in Sections 13 (a) (2), (3), (4), (5), (6), (8), (9), (10), or (11)*

(a) *Items Required.* Every employer shall maintain and preserve<sup>1</sup> payroll or other records containing the following information and data on each and every employee covered by the Fair Labor Standards Act but to whom the employer is not compelled to pay at least the minimum hourly wages provided in Section 6 or an applicable Wage Order, or to pay overtime excess compensation as provided in Section 7 due to the applicability of Section 13 (a) (2)<sup>2</sup>, 13 (a) (3)<sup>3</sup>, 13 (a) (4), 13 (a) (5)<sup>4</sup>, 13 (a) (6)<sup>5</sup>, 13 (a) (8), 13 (a) (9), 13 (a) (10)<sup>6</sup>, or 13 (a) (11):

- (1) Name in full,
- (2) Home address,
- (3) Occupation in which employed,
- (4) Date of birth if under 19,
- (5) Place or places of employment.

## Section 516.13

*Records in the Case of an Overlap of Previous Sections*

(a) *Duplicated Items.* Every employer having in his employ, employees who may be so affected by the various provisions and exemptions provided in the Fair Labor Standards Act as to bring into force more than one of the foregoing sections (516.2 through 516.12) shall maintain and preserve payroll or other records containing for all workweeks of employment covered by the Fair Labor Standards Act all data and information which are duplicated in those applicable sections.

(b) *Unduplicated Items.* Every employer referred to in (a) above shall also have contained in those payroll or other records, the additional unduplicated employee information and data and shall maintain and preserve such additional records as are provided in each of the applicable sections. The additional unduplicated employee information, data, and records to be maintained in any given workweek, however, need only be such items or records as are required by the section or sections applicable to such workweek of employment.

<sup>1</sup>For the period records shall be preserved, see sections 516.14 and 516.15, p. 14.

<sup>2</sup>For an explanation of this exemption, see Interpretative Bulletin No. 6, *Retail and Service Establishments*.

<sup>3</sup>For an explanation of this exemption, see Interpretative Bulletin No. 11, *Seamen Exemption*.

<sup>4</sup>For an explanation of this exemption, see Interpretative Bulletin No. 12, *Seafood and Fishery Exemption*.

<sup>5</sup>For an explanation of this exemption, see Interpretative Bulletin No. 14, *Agriculture*.

<sup>6</sup>For the Administrator's definition of the "area of production" see Part 536, *Regulations Defining the term "area of production" as used in Section 7 (c) and in Section 13 (a) (10) of the Fair Labor Standards Act*.

<sup>7</sup>This shall be the same as that used for Social Security record purposes.

### III. LENGTH OF TIME RECORDS SHALL BE PRESERVED

#### Section 516.14

##### *Records To Be Preserved Four Years*

(a) Each employer shall preserve for at least four years:

(1) *Payroll Records.* From the last date of entry, all those payroll or other records containing the employee information and data required under any of the applicable sections 516.2 through 516.13, and

(2) *Certificates, Union Agreements, and Notices.* From their last effective date, all those certificates, union agreements and amendments or additions thereto, and notices listed or named in these same applicable sections.

#### Section 516.15

##### *Records To Be Preserved Two Years*

(a) *Supplementary Basic Records.* Each employer shall preserve for a period of at least two years:

(1) *Basic Employment and Earnings Records.* From the date of last entry, all basic time and earning cards or sheets of the employer on which are entered the daily starting and stopping time of individual employees, or of separate workforces, or the individual employee's daily, weekly, or pay period amounts of work accomplished (for example, units produced) when those amounts determine in whole or in part the pay period earnings or wages of those employees.

(2) *Wage Rate Tables.* From their last effective date, all tables or schedules of the employer which provide the piece rates or other rates used in computing straight-time

earnings, wages or salary, or overtime excess compensation, and

(3) *Work Time Schedules.* From their last effective date, all schedules or tables of the employer which establish the hours and days of employment of individual employees or of separate work forces.

(b) *Order, Shipping, and Billing Records.* Each employer shall also preserve for at least two years from the last date of entry the originals or true copies of any and all customer orders or invoices received, incoming or outgoing shipping or delivery records, as well as all bills of lading and all billings to customers (other than "cash") which the employer retains or makes in the course of his business or operations.

(c) *Records of Additions to or Deductions from Wages Paid.* Each employer who makes additions to or deductions from wages paid shall preserve for at least two years from the date of last entry:

(1) Those records of individual employee accounts referred to in the footnote under the item "Total additions to or deductions from wages paid each pay period" found in sections 516.2 through 516.13,

(2) All employee purchase orders, or assignments made by employees, all copies of addition or deduction statements furnished employees, and

(3) All records used by the employer in determining the original cost, operating and maintenance cost, and depreciation and interest charges, if such costs and charges are involved in the additions to or deductions from wages paid.

### IV. LOCATION AND INSPECTION OF RECORDS

#### Section 516.16

##### *Place for Keeping Records*

(a) *Place of Records.* Each employer shall keep the records herein required safe and accessible at the place or places of employment,

or at one or more established central record

keeping offices where such records are customarily maintained. Where the records are maintained at a central record keeping office, other

than in the place or places of employment, such records shall be made available within 72 hours following notice from the Administrator or his duly authorized and designated representative.

##### *Inspection of Records*

(b) *Inspection of Records.* All records shall be open at any time to inspection and transcription by the Administrator or his duly authorized and designated representative.



## V. REPORTS ON RECORDS

### Section 516.17

#### *Computations and Reports*

Each employer shall make such extension, recomputation, or transcription of his records and shall submit to the Wage and Hour Divi-

sion such reports concerning persons employed and the wages, hours, and other conditions and practices of employment set forth in his records as the Administrator or his duly authorized and designated representative may request in writing.

## VI. GRANTING OF EXCEPTIONS

### Section 516.18

#### *Petitions for Exceptions*

(a) *Submissions of Petitions for Relief.* Any employer or group of employers who, due to peculiar conditions under which he or they must operate, desires authority to maintain records in other manner than herein required, or to be relieved of preserving certain records for the period named in these Regulations, may submit a written petition to the Administrator setting forth the authority desired and the reasons therefor.

(b) *Action on Such Petitions.* If, on review of the petition and after the completion of any necessary investigation supplementary thereto, the Administrator shall find that the authority prayed for, if granted, will

not hamper or interfere with the enforcement of the provisions of the Fair Labor Standards Act or any regulation or orders issued thereunder, he may then grant such authority but limited by such conditions as he may determine are requisite, and subject to possible subsequent revocation. The grant of authority hereunder, and all revocations of such authority shall be published in the Federal Register.

(c) *Compliance after Submission of such Petitions.* No employer or group of employers is relieved of any obligation to comply with all the requirements of these Regulations applicable to him, or to them, as a result of the submission of a petition or through delay or failure of the Administrator to act on a petition received.

## VII. REVISION OF REGULATIONS

### Section 516.19

#### *Amendment of Regulations*

(a) *Petitions for Revision of Regulations.* Any person wishing a revision of any of the terms of the foregoing Regulations on records to be kept by employers may submit in writing to the Administrator a petition setting forth the changes desired and the reasons for proposing them.

(b) *Action on Such Petitions.* If upon inspection of the petition the Administrator believes that reasonable grounds are set forth for amendment of the Regulations, the Administrator shall either schedule a hearing with due notice to interested parties, or make other provisions for affording interested parties an opportunity to present their views, both in support of and in opposition to the petition.

## Memorandum on Final Hearing

This is an action brought by the Department of Labor to enjoin the defendant from violating certain provisions of Sections 15(a) and 15(a) (5) of the Fair Labor Standards Act of 1938 (U. S. Code, Tit. 29, Section 201, et seq).

The defendant is a mutual ditch company organized under the laws of Colorado, owning and operating reservoirs, canals and ditches and other water distributing facilities, all located in Colorado, and is engaged in the maintenance, repair and servicing of said water facilities and the management thereof. The water is provided, and the system is used, for irrigating and cultivating agricultural products, such as corn, wheat, barley, oats, potatoes, beans, sugar beets, rye, and other crops mostly shipped in interstate commerce.

The defendant employs 16 persons. The charge is (1), that the defendant has worked many of its employees for workweeks longer than 44 hours in 1938, 42 hours in 1939, and longer than 40 hours since October 24, 1940, without compensating said employees for overtime during such respective periods at rates not less than one and one-half times the regular rate at which they were employed. And (2), that the defendant has failed to make, keep and preserve adequate records of its employees and the wages and the hours of employment and the pay, as required by the regulations.

The answer alleges defendant is a mutual ditch company organized under a statute of the State of Colorado for the maintenance and operation of an irrigation  
113 system for the exclusive irrigation of farm lands owned by its stockholders only. Admits that it maintains, keeps in repair and operates said reservoirs, canals, ditches and other water distributing facilities; that in so doing it carries on its activities solely in behalf of, and as trustee for, its stockholders. Admits that the water provided by its facilities is utilized in the production of crops.

Admits it employs in excess of 16 persons in and about its irrigation system.



For a second defense alleges it is a non-profit, mutual ditch company under the laws of Colorado, organized for the maintenance and operation of a system of irrigation canals and reservoirs for the purpose of diverting water from the public streams of Colorado, and transporting the water through canals, impounding the same in reservoirs, and distributing the same from its canals and reservoirs to its individual stockholders for the cultivation and tillage of the soil of its stockholders' farms.

That pursuant to the Constitution and laws of Colorado the courts have adjudicated to the various ditches and reservoirs of the defendant the right to divert from the public streams certain quantities of water of various priority dates for use in irrigating lands lying under, and susceptible of irrigation from its ditches and reservoirs which lands are owned by the stockholders of the defendant.

That said water rights and the water diverted thereunder are owned not by the defendant but by its stockholders. The proportionate ownership of the various stockholders of the defendant under said water rights is evidenced by stock issued by the defendant to its stockholders. That each share of stock is entitled to a pro rata share of the waters available for distribution.

The defendant is organized for said purpose and none other, and does not sell water to anyone or carry water for hire.

That the stockholders annually levy an assessment upon their stock sufficient to defray the expenses necessary to maintain and operate the canals and reservoirs, and pay principal and interest on its outstanding bonds. Said assessments are the only source of income of the defendant and it is not organized for profit, but is a non-profit operation, and does not, and cannot, declare dividends.

That water rights so decreed are pertinent to, and constitute a part of, the land owned by defendant's stockholders, on which the water carried through the  
114 ditches and reservoirs used for irrigation. That under the Constitution of Colorado the ditches and

reservoirs, etc., are not separately taxed, but the value thereof is included in the valuation for tax purposes placed upon the lands of the defendant's stockholders upon which the waters are used.

The above facts are all admitted by the Stipulation of Facts under which this case was tried.

We take judicial notice that in Colorado and other arid states the irrigation of the lands of the stockholders is a branch of agriculture and farming business by them conducted, and necessarily practiced as an incident to, and in conjunction with their farming operations, and necessary to the cultivation of the stockholders' lands and their production of crops.

That the maintenance and operation of the irrigation ditches and reservoirs by the defendant as a mutual company for and on behalf of its stockholders, and the work of said employees is essential to the securing of such irrigation water and the transportation thereof from the public streams to the farms of the individual stockholders. All employees of the defendant are exclusively engaged and employed in this work for the purpose of securing the water from the public streams, impounding it in reservoirs, and distributing it from the canals to the individual laterals leading to the land of each defendant stockholder, and generally in maintaining of said irrigation system.

Defendant argues that its employees are in truth and in fact employees of the farmer stockholders of the defendant, engaged and employed in irrigation and production and in practices and occupations necessary to the production of crops and that said employees are paid by the farmer stockholders through the agency of the defendant. That the said employees are employed in agriculture and in executive and administrative capacities in connection with the maintenance and operation of said irrigation system, and are exempted from the provisions of Sections 3 and 4 of the said Fair Labor Standards Act of 1938 by Section 13 thereof.

Furthermore, we notice that several years ago the land

owned by the stockholders of the defendant company—like most of the lands in Colorado—was arid, dry, and good for grazing only.

The stipulation shows that these employees are engaged in the work of conducting the water from streams through miles of canals to the land of the defendant's stockholders. The ditch riders and the tenders are paid for that work, which is, as the plaintiff alleges in its complaint, necessary for the production of agricultural crops, and we may observe at this point that if the work is not necessary for raising crops they cannot be engaged in producing commodities for interstate commerce as the Government claims.

The Government claims first the definition of agriculture upon which the defendant relies for its exemption does not specifically use the word "irrigation." That Act is as follows, Section 3(f):

" 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market."

It will be observed this definition of agriculture is all-inclusive and very broad. It includes "farming in all its branches," including the production, cultivation and tillage of the soil, and: "Any practices \* \* \* performed by a farmer, or on a farm as an incident to, or in conjunction with, farming operations \* \* \*"

A little background may not be amiss. The first settlers who came to Colorado, or to the arid West for that matter, constructed little private ditches to take water from

the rivers or streams to their lands. Apparently there could be no question but what such a farmer using a ditch in conjunction with two or three other neighbors could claim an agricultural exemption for those employees who worked on the ditch, and thereby brought water a mile or so from the river to the land to which it was applied. The next step, as counsel for the defendant well points out, was that two or three farmers for economy's sake built a longer ditch and perhaps employed more help for the construction of the same and for maintenance from year to year.

The next step was of development of the type we are dealing with, the organization of mutual ditch companies, consisting of a larger combination of farmers organized to carry water to arid lands remote from the river—such as the defendant—under the law, made up of hundreds of farmers, and instead of water being carried half a mile from the stream, often the point of application is 60 or 70 miles therefrom.

“The consumer in Colorado has all the rights of an appropriator as though himself diverting the water  
116 from its natural source, and the canal company is only an agent to carry the water to him. This has been held true of mutual companies as of other kinds, \* \* \*.” *Wiel on Water Rights*, 3rd Ed., Vol. 2, Section 1267.

Sec. 1266: “Mutual companies are usually such that shares of stock represent rights to specific quantities of water, and the stockholder's right to a supply rests upon his stock \* \* \* the company being formed to supply water to its stockholders only.”

“Because of this extensive prevalence of mutual companies in practice, it is very important to note that, being in private service only, they are not subject to the public control which obtains as to public service companies.”

And Long on Irrigation, Section 280, 2nd Ed., points out that these mutual companies are organized more effec-



tively to supply themselves with water. Further, as to the nature of these companies see *Beatty v. Bd. of County Commissioners of Otero County*, 101 Colo. 346.

The Fair Labor Standards Act, Section 213(a), exempts generally executives, seamen, telephone operators, employees engaged in agriculture, etc.

The Congressional Record throws some light upon this intent of Congress (Vol. 83, parts 7 and 8), when the bill was under consideration.

"Mr. Cox: If the purpose of the bill (Wage and Hour) is to relieve the distressed condition of sub-standard workers, and if the lowest paid workers today in this country are found in the fields of the farm and retail establishments, then why did the committee exempt these classes from the provisions of the bill?"

"Mr. Healey: I am sure the gentleman knows the answer: because that would exceed the power of Congress. We are limited by the Constitution to business in Interstate Commerce."

Apropos of the constitutionality of the Act when it was before the Senate see Congressional Record, Vol. 83, Part 8, p. 9162, et seq.

As to agriculture having different problems than industry see *Fleming v. Hawkeye Pearl Button Co.*, 113 Fed. (2nd) 52:

"\* \* \* the motivating purpose of Congress was to benefit industrial workers. Both federal and state governments have recognized a marked difference between industrial workers and agricultural laborers. Agriculture was manifestly exempted from the provisions of the Act because it was not considered feasible to regulate wages paid agricultural laborers. Different considerations apply in the case of agricultural labor than in the case of industrial labor. Agricultural labor is not subject to the evils of sweating which may be present in the factory system. There is no evil of mass employment at low wages in agriculture, nor are the same problems of working long

hours indoors, nor of health and sanitation present. Any attempt to regulate farm wages would seem to present a difficult question because the farm laborer generally does and must of necessity receive a substantial part of his income in board, room and laundry. Experience and  
 117 necessity preclude treatment of farm labor in a statute framed to remove from the national economic life the evils of industrial labor."

Dye v. McIntyre Floral Co. (1940), 144 SW (2d) 752.

"Manifest reason underlying exemption of employees engaged in agriculture \* \* \* a recognition of the seasonal nature of occupation."

Congress evidently intended that the definition of agriculture should be very broad, and hence used the expression "farming in all its branches."

For the rule in Colorado see Long on Irrigation, 2nd Ed., Section 2: "The term 'irrigation,' in its primary sense, means any act of watering or moistening, yet, in common parlance, its meaning is ordinarily restricted to the watering of lands for agricultural purposes."

And Section 3: "\* \* \* Tracts of land of vast extent, which with a sufficient supply of water, would be productive to bountifulness, lie practically desert, producing nothing but sagebrush and cactus, with here and there a ragged fringe or struggling cluster of cottonwoods along infrequent streams. In this region, agriculture is often absolutely impossible without the aid of irrigation. This condition of the country and the imperative necessity for irrigation to render it productive, is a matter of common knowledge, of which the local courts will take judicial notice."

See also Platte Water Co. v. Northern Colorado Irrigation Co., 12 Colo. 525.

In Conclusion: The Government takes the position that these employees are engaged in commerce and in the production of foods for commerce and yet denies that they are engaged in agriculture. But if not engaged in agriculture what are they engaged in? I am of the opinion they

are engaged in such agriculture as the Act defines the term. See also (a) and (b) of Section 2 of the findings and declaration of policy contained in the Act.

All the Federal legislation, of which this Act is only a small part, makes a clear distinction between agricultural workers and those engaged in industry. Congress has never felt it necessary to regulate agriculture or its procedure. This for the very good reason that there is no reason why farm laborers working outdoors and engaged in seasonal work, should not be permitted to work during the busy season longer hours than industrial workers.

Furthermore, these mutual irrigation companies—while technically a corporate entity perhaps—represent nothing more than the combined efforts of the farmers of the arid regions to get water from distant streams to their respective farms by combining their effort and capital—all part of the agricultural process necessary to the production of crops on arid lands. That by their combined efforts production of agricultural crops is made possible on land that otherwise would be dry and arid, as the early settlers found it.

Findings of fact and conclusions of law in favor of defendant may be presented by counsel, and the bill is dismissed.

J. FOSTER SYMES,  
District Judge.

Filed March 21, 1947.

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#### Findings of Fact and Conclusions of Law

This cause coming on to be heard on February 6, 1947, and the Court having heard the testimony introduced on behalf of the parties and the arguments of counsel and having considered the briefs filed by counsel, and being fully advised in the premises, doth make the following Findings of Fact and Conclusions of Law:

## Findings of Fact.

1. Defendant is, and at all times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Colorado, with its principal office and place of business at 311 C. A. Johnson Building in the City and County of Denver, State of Colorado.

2. Defendant is a non-profit corporation and is a mutual ditch company organized and existing under particular statutes of the State of Colorado relating to such corporations for the sole purpose of owning, maintaining and operating a system of irrigation canals and reservoirs for the purpose of diverting water from the public streams of Colorado and transporting such water through said canals and impounding same in said reservoirs and distributing same from said canals and reservoirs to the individual stockholders of the defendant, or their nominees, for the irrigation of the farm lands under said irrigation system of defendant.

3. Defendant has 10,500 shares of authorized capital stock. Each share of such capital stock entitles the owner thereof to an equal and pro rata share with every other share of the property of the defendant and of the available water supply in the division of the defendant's irrigation system to which such stock is allocated and to the delivery of such water into the individual farmer's lateral in accordance with the defendant's By-Laws and operating practices, and is also subject to an equal and pro rata assessment with every other share of stock for the expenses of the defendant as hereinafter more clearly outlined.

4. The defendant's irrigation system was planned and conceived as a complete and new project by the owners of dry grazing or unproductive lands in the Counties of Adams, Boulder, Jefferson and Weld, in the State of Colorado, who wished to convert such lands into irrigated farm lands; and in order to accomplish this purpose, these owners of said grazing or unproductive lands organized and incorporated the defendant company under the laws



of the State of Colorado as a mutual ditch company, which defendant mutual ditch company borrowed money, planned, surveyed and constructed the irrigation system of the defendant, and which system consists of four (4) large and a number of small water storage reservoirs and about three hundred (300) to four hundred (400) miles of canals located in the Counties of Adams, Boulder, Jefferson and Weld, in the State of Colorado, necessarily built for the running and storage of water to irrigate lands of its stockholders. Certain of these canals have their headgates on South Platte River, Clear Creek, Boulder Creek or other public streams in the State of Colorado through which water for irrigation purposes is diverted from such streams and carried directly through such canals of defendant and distributed therefrom into the farmers' lateral ditches extending from their farms to such canals of defendant. Certain of these canals of defendant are known as reservoir intake canals through which waters are diverted from said streams and carried therethrough and impounded in defendant's reservoirs at the ends of said intake canals, which waters are subsequently diverted from said reservoirs through distributing canals of defendant extending therefrom, from which distributing canals of defendant, extending therefrom, from which distributing canals of defendant and through headgates therein such waters are delivered to the farmers into the farmers' lateral ditches extending from their farms to such distributing canals of defendant.

5. The record title to the lands upon which defendant's canals and reservoirs are located stands in the name of the defendant. Said title consists in part of a full fee title, in part of a fee title so long as the land is used for canal or reservoir purposes, in part of deeded easements, and in part of prescriptive right title.

6. Pursuant to the constitution and statutes of the State of Colorado decrees have been entered by courts of the State of Colorado having jurisdiction of such matters adjudicating to said canals and reservoirs of defendant, the record title to which stands in the name of the de-

pendant, the right to divert from the public streams in the State of Colorado through and by means of said canals and to store in said reservoirs certain quantities of water as of various priority dates for use in irrigating lands lying under and susceptible to irrigation from said canals and reservoirs. Under such decrees all of said waters can be diverted and used and are diverted and used only for irrigation purposes by defendant's stockholders or their nominees in growing agricultural crops. Water delivered by and through the defendant's irrigation system can be and is delivered only to its stockholders or their nominees.

7. Defendant's stockholders, for the most part, are farmers in the Counties of Adams, Boulder, Jefferson and Weld, in the State of Colorado. There are approximately one hundred thousand (100,000) acres of farm land which are irrigated, in whole or in part, by the water hereinabove mentioned carried through defendant's irrigation system, in a manner and under practices commonly used by farmers who raise agricultural crops under defendant's irrigation system.

8. In some instances an irrigation canal in the defendant's irrigation system for a part of its length is owned (exclusive of the water carried therein) jointly by the defendant and by other irrigation company or companies. In such instances the cost or expense of carrying such water is paid by some mutual agreement between the defendant and such other irrigation company or companies.

9. The major portion of the water distributed through the defendant's irrigation system is so-called storage water which is diverted from the public streams and run into the defendant's reservoirs during the non-irrigation season and run out of the reservoirs through defendant's distributing canals and delivered to the laterals of the individual farmers during the irrigation season. In addition to this storage water, there is diverted from the public streams and run through the defendant's canals and delivered to the laterals of the individual farmers such direct irrigation water as is available from time to time.

Usually in the month of May of each year or, in any

event, prior to the time distribution of storage water is started for irrigation, the Board of Directors of the defendant estimates from the then available supply the amount of storage water which can be distributed on each share of stock in the several divisions of the company's system during the then current irrigation season; and notice of said estimate is sent to each stockholder of the defendant. In the event of any later increased supply of storage water over and above the amount of such estimate, revisions of such estimate are from time to time made and notice thereof sent to the stockholders. Thus, during the irrigation season, the individual farmer will have available to him water from two (2) sources—(1) so-called direct irrigation water, in variable pro rata amounts and (2) his estimated pro rata share of such storage water. During the irrigation season, the individual farmer contacts the defendant's employee ditch rider, or otherwise makes known to the defendant company, the amount of water which he desires delivered to him from his allocated portion of such estimated amount of storage water. From day to day these demands for water by the individual farmers are received by the defendant through its ditch rider, lake tender, superintendent or Denver office; and, thereafter, insofar as water is available to meet such demands from day to day, such water is turned out of the defendant's storage reservoirs and run through the defendant's distributing canals by the defendant's ditch riders and turned out of the defendant's canals by defendant's ditch riders through diversion headgates therein into the farmer's individual lateral. An account is set up in the Denver office of the defendant with each stockholder who is credited with the estimated pro rata amount of storage water to which he will be entitled during the current irrigation season, and a charge is made against the account of each stockholder for each withdrawal of water. When direct irrigation water is available, it is, when demanded, run and distributed to the farmers upon a pro rata stock-ownership basis by the above-mentioned employees of the defendant.

None of the defendant's employees have anything to do

with the application or use of the water after the same is turned out of the defendant's canals into the individual laterals of the farmers.

10. Defendant does not sell water to anyone and does not carry water for hire.

11. Under the laws of the State of Colorado and practices arising thereunder, agricultural lands for taxation purposes are classified, among other classifications, into such classifications as irrigated farm lands, non-irrigated farm lands, grazing lands, and other classifications not material here. Irrigated farm lands are valued at a higher rate for taxation purposes, since such lands by reason of their having water for irrigation are deemed more valuable than non-irrigated lands. Under the constitution and statutes of the State of Colorado there are no real or personal property taxes separately assessed against the shares of stock of the defendant, or the water represented thereby, or against the canals and reservoirs or other properties constituting the irrigation system of the defendant, since it is deemed that for taxation purposes the value represented by said irrigation system and by the irrigation water available to such shares of stock is  
123 taxed by increasing the tax assessment value placed upon the lands classified as irrigated farm lands upon which such water is used.

12. Each year at the annual stockholders' meeting the stockholders of the defendant levy an annual assessment upon the outstanding stock of the defendant for the purpose of raising money necessary during the succeeding fiscal year to defray expenses incident to the maintenance and operation of the defendant's irrigation system and the payment of principal and interest on defendant's outstanding bonds, and other incidental corporate purposes. The payment of such assessments by each stockholder is a condition precedent to such stockholder's right to receive water on his stock. This is the sole source of income of defendant, with the exception of some incidental income from lease rentals for duck hunting and similar purposes on some of its reservoirs, the receipt of which operates to reduce the amount of the annual assessment made



upon the stock, and except for certain reimbursement expense income received from other irrigation companies where there is a joint ownership of an irrigation canal operated by the defendant. The defendant also owns some stock in other irrigation companies from which it secures part of the water available to its stockholders and pays some expenses to other companies for water secured from them.

13. The defendant, as a mutual ditch company, has not and cannot make a profit, and has not paid and cannot pay any dividends.

14. The farm lands irrigated by water so distributed by defendant through its irrigation system are highly productive, and such high degree of productivity results in a substantial degree from the irrigation thereof by the use of such waters by the individual farmers under the usual practices of all the farmers producing agricultural crops under defendant's irrigation system. On these irrigated farm lands there are planted, grown and produced in large quantities a wide variety of agricultural crops; such as sugar beets, wheat, corn and other grains, potatoes, peas, beans and other crops; and such irrigation water is necessary to and is used for the growth and production of such crops. If such irrigation water were not available  
124 and used on such land, it would cease to be irrigated farm land; and it would become non-irrigated farm land, grazing land or other class of land.

15. The water collected, run and delivered by the defendant through the labor of certain of its employees to the individual farmers under the defendant's irrigation system, in manner as elsewhere set forth, is used by the individual farmers on their farm lands for irrigation purposes in connection with the tillage of the soil and the production, cultivation, growing and harvesting of the aforementioned agricultural crops. The distribution and delivery of such water by the defendant to the individual farmers into the farmer's individual lateral has been and is being made substantially in the manner provided for in defendant's By-Laws. The defendant has exercised control over the diversion headgates or weirs on or along its

canals, through which diversion headgates or weirs water is diverted to the individual farmers for their use in irrigation substantially in the manner as specified in the By-Laws.

16. Sugar beets are grown on said lands with the use of said water in substantial quantities. Such sugar beets are suitable and are purchased and used only for processing into refined sugar by several sugar beet factories of the Great Western Sugar Company located in the Cities of Brighton, Fort Lupton, Greeley, Longmont, and other points in the State of Colorado; and a substantial part of the refined sugar processed from these sugar beets is sold, shipped and delivered annually by said sugar company to states other than the State of Colorado. It is well known and understood by defendant and by the farmers producing such sugar beets that such sugar beets will be used and consumed in the process of making refined sugar, a substantial part of which is to be sold and shipped by said sugar company in interstate commerce.

17. Substantial quantities of corn, peas and beans, which are produced by certain farmers on their said irrigated lands with the use of said water, are sold by said farmers to numerous and diverse vegetable canning plants and factories located in the Counties of Adams, Jefferson, Boulder, and Weld, in the State of Colorado, and by said canning plants and factories are processed, canned, shipped and sold in substantial quantities by said canning factories in interstate commerce to states other than 125 the State of Colorado. The defendant and said farmers on whose irrigated lands said crops are produced know and have reason to believe that substantial quantities thereof will be so processed and then sold and shipped in interstate commerce to points other than the State of Colorado by said canning factories or plants.

18. Wheat raised by said farmers on said farm lands with the use of said water is by said farmers sold to grain elevators or to flour mills located in the State of Colorado. The flour produced from said wheat sold to said flour mills is shipped by said flour mills in substantial quantities in interstate commerce to points outside the State of Colo-

rado. The defendant and the farmers on whose irrigated lands such wheat is produced know and have reason to believe that substantial parts thereof so processed into flour will be sold and shipped by said flour mills in interstate commerce to points outside the State of Colorado.

19. The defendant and the farmers on whose irrigated land the aforesaid crops are produced know and have reason to believe that substantial quantities of crops grown thereon which are not processed in the State of Colorado will be shipped and sold regularly in interstate commerce to points outside the State of Colorado by persons other than the defendant or the individual farmers.

20. The defendant has three (3) classes of employees: (1) employees in the Denver office of the company; (2) lake or reservoir tenders and (3) ditch riders. It also owns and operates, in connection with the maintenance and repair of its canals and reservoirs, a drag line and employs a man to operate such drag line. On occasion it employs a man to operate such drag line. On occasion it performs maintenance work.

21. The said lake or reservoir tenders perform maintenance work upon the defendant's storage reservoirs and also operate the intakes and outlets of such reservoirs, and during the irrigation season, release from storage such water as is available to fill the current requirements of the farmers who are entitled to the water. In most instances the lake or reservoir tender is also a ditch rider and has charge of the maintenance of a section of the ditch below the lake and the delivery of the water therefrom to the farmers.

22. The ditch riders, from day to day during the irrigation season, receive orders or demands from the defendant's stockholders or their nominees for the delivery of specified quantities of water. Each of the defendant's ditch riders has a specified section of defendant's canals to control, such sections usually ranging from five (5) to fifteen (15) miles in length; and the ditch rider will receive the orders or demands for water from the farmers along his section of the canal. If direct irrigation water

only is then being delivered, the ditch rider will divide the water to the farmers who have placed their said orders or demands on a pro rata basis according to stock-ownership. If storage water is then being delivered, the sum total of the orders or demands will be forwarded to the lake tender or to the superintendent of the company or to the Denver office of the company; and water will be turned out of the lake or reservoir, if available, to satisfy these orders or demands on a pro rata stockholder's basis. Defendant's ditch rider sets the headgate or weir on defendant's canal so as to divert the water called for from the pro rata share of the farmer's water into the farmer's individual lateral, and from this point the farmer has direct and sole charge of the carriage of such water through the farmer's individual lateral and the application of the water to the farmer's land.

23. The above-mentioned reservoir tenders and ditch riders, in addition to the work that each does, as hereinbefore provided, collectively and interchangeably, keep the canals of defendant free from weeds, rubbish and sand and in good repair for the free and uninterrupted flow of water therethrough; keep the reservoirs and their dams, embankments and outlet structures and all stream diversion works and structures in good repair and working order for the safe storage and flowage of water therefrom; keep the diversion headgates and weirs to the individual farmer's laterals in good repair and operating order for the delivery of water into said laterals; patrol the canals, reservoirs, and other appurtenant structures, and at-

127 tend to diverting the water from the natural streams and the reservoirs; conduct and run the said water through and out of said canals and reservoirs and through the diversion headgates and weirs into the farmers' individual laterals; and, during the irrigation season, keep in daily contact with the farmers under defendant's system, and learn of their wishes and accept their orders for the delivery to each farmer of his portion of the water of defendant's system. All of this work is necessary to the maintenance and operation of the defendant's irrigation system and to the running and delivery of water thereby through the diversion headgate or weir into the individual



farmer's lateral for the production of said agricultural crops.

24. During the irrigation season, many of defendant's ditch riders normally spend five (5) to six (6) hours a day in patrolling their respective sections of defendant's canals and measuring and delivering the water to the individual laterals of the farmers and performing maintenance work on defendant's canals. Two (2) or three (3) hours a day are normally spent by such ditch riders in making up their company required reports for their day's work and reporting to the defendant's main office as to the water which has been delivered to each stockholder during the day, which reports thereupon become a part of the defendant's business records. Said employees are subject to call for such work during the irrigation season seven (7) days a week.

25. During the storage season, which covers roughly the late fall, winter and early spring months, employees of defendant are engaged in general repair and maintenance work necessary to the maintenance and operation of defendant's irrigation system, and work approximately eight (8) hours a day for six (6) days a week.

26. The number of ditch riders, lake tenders and maintenance men mentioned above range upwards from sixteen (16) to approximately twenty-six (26).

27. In numerous and diverse work weeks in the year some of defendant's lake tenders and ditch riders and other maintenance employees have worked in excess of forty (40) hours in the workweek and have not been paid overtime for their hours in the workweek in excess of forty (40) at one and one-half ( $1\frac{1}{2}$ ) times their regular rate of pay. For the most part during the irrigation season, which includes the late spring, summer and early fall months, these employees are paid on a flat monthly salary basis for all hours worked without overtime. During the non-irrigation season these employees for the most part are paid on a day basis for each day of work. Drag line operators and some of their helpers have been paid on a straight hourly rate basis.

28. In the Denver office there are employed and work for the defendant Frank N. Bancroft, President; Mrs. F. K. Smith, Secretary; and H. H. Bryant, Superintendent (who also works in the field as such Superintendent). It is agreed by the plaintiff and the defendant, for the purpose of this case only, that the above three (3) namely, Frank N. Bancroft, President; Mrs. F. K. Smith, Secretary; and H. H. Bryant, superintendent; and L. James Billington, Foreman, are not involved in this case, since, upon the basis of information furnished plaintiff, these employees probably are exempt under Regulation 541 of the plaintiff, as executive, administrative or professional employees. Defendant also contends that they are further exempt under the agricultural exemption in the Act, with which contention plaintiff disagrees.

29. Mr. Ermil E. Coler is now employed in defendant's Denver office as a bookkeeper and as an accountant. Mr. Coler has charge of and keeps the books of the defendant company, including receipts and disbursement ledgers, bank and financial account ledgers, showing bank deposits and withdrawals and expenditures for all of the activities of the company, and prepares the annual financial statement of the company which is printed and distributed to all stockholders. He examines the daily diary or work reports from each ditch rider or lake tender for each day; he checks the daily diary or work reports with the time sheets that are turned in monthly by each ditch rider and lake tender to see that the time sheets are correct, and if correct, he apports the total time shown by the monthly time sheet among all of the different accounts against which the work done is charged. Mr. Coler, in the absence of the secretary, has charge of and keeps the records showing the assessments paid by the stockholders of  
129 the defendant and the records relating to the delivery of water. He prepares most of the records and reports required of the defendant by state and federal law. He assists an outside certified public accountant in the annual audit of the defendant's books. All the work performed by Mr. Coler, as bookkeeper and accountant, is necessary in the conduct of defendant's business and to the keeping of correct records and to the proper keeping

of the defendant's records and accounts. Mr. Coler at times works in excess of forty (40) hours per week without being paid time and one-half for work in excess of forty (40) hours per week.

Mr. Coler is not engaged in commerce or in the production of goods for commerce as defined in the "Fair Labor Standards Act of 1938."

30. The defendant, as regards its employees, keeps and preserves the following records:

- (a) Names in full.
- (b) Home addresses.
- (c) As none of defendant's regular employees are under 19, dates of birth are kept only in connection with Social Security applications. Minor employees, if any, are only employed by the defendant as temporary employees in the irrigation season or during the existence of an emergency.
- (d) Occupations in which employed.
- (e) Place or places of employment.
- (f) Total daily or weekly straight time earnings or wages for all employees not employed on a monthly salary basis.
- (g) Total additions to or deductions from wages paid each pay period.
- (h) Total wages paid each pay period.
- (i) Date of payment and the pay period covered by payment.
- (j) Regular hourly rate of pay for all employees not employed on a monthly salary basis.
- (k) Hours worked each work day and total hours worked each workweek if employee is employed on an hourly basis.

The defendant, as to its employees, has not kept and preserved records with respect to:

(a) Time of day and name of the day on which the workweek began.

(b) Hours worked each day (if in excess of 8 hours) and total hours worked each workweek if employee is on a monthly salary basis.

(c) Total weekly overtime excess compensation.

31. That in the month of December, 1940, the Administrator of the Wage and Hour Division of the United States Department of Labor issued his "Interpretative Bulletin No. 14" entitled, "Agriculture, Exemption of Agriculture; and on The Exemptions for Processing Agricultural Commodities," and which bulletin is the latest such bulletin promulgated by said department covering "agriculture."

Pursuant to Section 11(c) of the Fair Labor Standards Act, the said Administrator issued "Regulations on How to Keep Wage and Hour Records under the Fair Labor Standards Act of 1938," and which regulations are the latest such regulations promulgated by said Administrator covering the keeping of "wage and hour records."

32. The water rights so decreed to the canals and reservoirs, the record title to which stands in the name of the defendant, are appurtenant to and constitute a part of the land owned by the defendant stockholders on which all water carried through the ditches and reservoirs is used for irrigation. Said canals, ditches and reservoirs constitute and are a part of the lands on which the water carried therethrough is used for such irrigation purposes.

33. All the employees of defendant are in fact employees of the stockholders of the defendant employed in connection with the farming operations of the stockholders of the defendant and the work of all of said employees is essential to the securing of irrigation water and the transportation thereof from the public streams to the farms of the individual stockholders of the defendant. The irrigation of the lands of the stockholders, as to which the services and work of all of the employees of the defendant is essential, is a branch of agriculture and farm-



ing business by said stockholders conducted and necessarily practiced as an incident to and in conjunction with their farming operations and necessary to and a part of the cultivation of the stockholders' lands and their production of crops.

34. The irrigation of the lands of the stockholders of the defendant is a branch of agriculture and farming business by them conducted, and is a necessary practice, 131 and an incident to, and in conjunction with their farming operations, and is absolutely essential to the cultivation and tillage of the soil of said stockholders' farms and to the production, cultivation, growing and harvesting of said agricultural crops thereon, and without the application and use of said water on said farms, such cultivation and tillage of the soil thereof, and such production, cultivation, growing and harvesting of such agricultural crops and commodities would not be possible. The maintenance and operation of the irrigation ditches and reservoirs by the defendant, as such mutual ditch company, for and in behalf of its stockholders, and the work of all of its employees is absolutely essential to the securing of such irrigation water and the transportation thereof from the public streams to the farms of the individual stockholders of the defendant.

All employees of the defendant have been and are in truth and in fact, through and by reason of the agency of the defendant for its stockholders, for all intents and purposes employees of the farmer stockholders of the defendant and are engaged and employed in the irrigation and production and in practices and occupations necessary to the production of agricultural and horticultural crops and commodities.

35. All of the employees of the defendant involved in this case, except Ermil E. Coler, referred to in paragraph 29 hereof, are engaged in commerce or in the production of goods for commerce within the meaning of the said "Fair Labor Standards Act of 1938."

36. All of the employees of the defendant involved in this action are employed in agriculture within the defini-

tion of the word "Agriculture" as set forth in said "Fair Labor Standards Act of 1938."

### Conclusions of Law

1. This Court has jurisdiction of the defendant and the subject matter of this action.

2. The defendant and all its employees involved in this action, except the said Ermil E. Coler, are engaged in commerce or in production of goods for commerce as defined in the "Fair Labor Standards Act of 1938."

3. All of the employees of the defendant are employed in agriculture as the term "Agriculture" is defined in said "Fair Labor Standards Act of 1938," and all of said employees are exempt from the provisions and coverage of said "Fair Labor Standards Act of 1938" and amendments thereto under the provisions of Section 13 thereof, as amended.

4. In no respect complained of in the complaint filed herein has the defendant violated the provisions of the "Fair Labor Standards Act of 1938."

5. Judgment and decree should be entered herein dismissing the complaint on the merits.

Dated this 15th day of April, 1947.

By the Court:

J. FOSTER SYMES,

District Judge.

Approved as to form: WILLIAM S. TYSON, Solicitor, U. S. Department of Interior; REID WILLIAMS, Regional Attorney, Wage and Hour Division, U. S. Department of Labor; Attorneys for plaintiff; BANCROFT, BLOOD & LAWS, BROCK, AKOLT, CAMPBELL & MYER, Attorneys for Defendant.

Filed and entered on the docket, United States District Court, Denver, Colorado, April 5, 1947.

## Decree

This matter coming on before the Court, and the cause having been tried to the Court, and the Court having heard the evidence and argument of counsel, and being fully advised in the premises, and having heretofore made its Findings of Fact and Conclusions of Law;

It is now, therefore, ordered, adjudged and decreed that the complaint in this action filed be, and the same is, hereby dismissed on its merits.

It is further ordered, adjudged and decreed that each party shall pay his or its costs.

Dated at Denver, Colorado, this 15 day of April, A. D. 1947.

Approved as to form:  
Reid Williams

By the Court:

J. FOSTER SYME3,

District Judge.

Filed and entered on the docket, United States District Court, Denver, Colorado, April 15, 1947.

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Order for Substitution of Party Plaintiff.

The parties hereto having stipulated that the functions of the plaintiff, L. Metcalfe Walling, Administrator of the Wage and Hour and Public Contracts Division of the United States Department of Labor, under the Fair Labor Standards Act of 1938, Title 29 U.S.C., Section 201 et seq., have been transferred to William R. McComb, Administrator, who is now the duly appointed and qualified Administrator of the Wage and Hour and Public Contracts Divisions of the United States Department of Labor, effective March 28, 1947, and that the said William R. McComb, Administrator, may be substituted as plaintiff herein in the place and stead of the said L. Metcalfe Walling, Administrator of the Wage and Hour and Public Contracts Divisions of the United States Department of Labor, it is

Ordered that William R. McComb, Administrator of the

Wage and Hour and Public Contracts Divisions of the United States Department of Labor, may be substituted as plaintiff herein in the place and stead of L. Metcalfe Walling, Administrator, without prejudice to the proceedings already had in this action, and that this cause may be continued and maintained by said William R. McComb, Administrator of the Wage and Hour and Public Contracts Divisions of the United States Department of Labor.

Dater this 18th day of July, 1947.

J. FOSTER SYMES, Judge.

136 Filed and entered on the docket United States District Court, Denver, Colorado, July 18, 1947.

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#### Notice of Appeal

Notice is hereby given this 10th day of July, 1947, that the plaintiff, William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, hereby appeals to the United States Circuit Court of Appeals for the Tenth Circuit from the judgment of this Court entered on the 15th day of April, 1947.

WILLIAM S. TYSON,  
Solicitor.

BESSIE MARGOLIN,  
Assistant Solicitor.

REID WILLIAMS,  
Regional Attorney.  
United States Department of Labor,  
Attorneys for Plaintiff.

137 Filed July 12, 1947.

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## Designation of Record on Appeal

To the Clerk of the Above-named Court;

In accordance with the provisions of Rule No. 75 of Federal Rules of Civil Procedure for the District Court of the United States, the appellant, William R. McComb, plaintiff herein, hereby designates the entire and complete record, proceedings and evidence herein as the record on appeal.

In accordance with Rule 75(g) of Federal Rules of Civil Procedure, you are hereby requested to make a transcript of the record, proceedings, and evidence, to be contained in the record on appeal, and to transmit same to the United States Circuit Court of Appeals for the Tenth Circuit, pursuant to the Notice of Appeal filed in the above-entitled cause, such transcript to contain the following:

1. Complaint filed May 13, 1946.
2. Defendant's Answer dated July 8, 1946.
3. Stipulation and Agreement as to Certain Facts, together with Exhibits 1, 1a, 2, 3, 3a, 4, 5, and 6, attached hereto, dated September 26, 1946, and filed September 27, 1946.
4. Memorandum on Final Hearing by Honorable J. Foster Symes, United States District Judge, filed March 21, 1947.
5. Findings of Fact and Conclusions of Law of Honorable J. Foster Symes, United States District Judge, of date April 15, 1947.
6. Decree of Honorable J. Foster Symes, United States District Judge, of date April 15, 1947.
7. Stipulation for Substitution of William R. McComb as Party Plaintiff.
8. Order Substituting William R. McComb as Party Plaintiff.
9. Notice of Appeal.
10. Designation of Record on Appeal.

Since the complete record and all the proceedings and evidence in this action is designated as the Record on Appeal, a statement of points of the appeal under Rule 75(d) of the Federal Rules of Civil Procedure is omitted herefrom.

WILLIAM S. TYSON,  
Solicitor.

BESSIE MARGOLIN,  
Assistant Solicitor.

REID WILLIAMS,  
Regional Attorney.—

United States Department of Labor,  
Attorneys for Plaintiff.

139 Filed July 12, 1947.

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Clerk's Certificate.

I, G. Walter Bowman, Clerk of the United States District Court for the District of Colorado, do hereby certify the foregoing pages numbered one (1) to one hundred thirty-nine (139), both inclusive, to be a full, true and correct transcript and copy of so much of the record and proceedings as are designated by counsel and as required under Paragraph G of Rule 75 of the Rules of Civil Procedure, in a case lately pending in said court, wherein William R. McComb, Administrator of the Wage and Hour Division of the United States Department of Labor was plaintiff, and The Farmers Reservoir and Irrigation Company was defendant, No. 1753 Civil, as fully and completely as the same still remain on file and of record in my office at Denver, Colorado.

In testimony where, I have hereunto set my hand and affixed the seal of said court at my office at Denver, Colorado, this 13th day of August, 1947.

G. WALTER BOWMAN, Clerk.

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140 Filed August 14, 1947. Robert B. Cartwright,  
Clerk.

And thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Tenth Circuit:

Record Entry: Cause Argued and Submitted.

Thirty-third Day, November Term, Friday, January 9th, A. D. 1948. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard, Reid Williams, Esquire, and Bessie Margolin appearing for appellant, John P. Akolt, Esquire, and Frank N. Bancroft, Esquire, appearing for appellee.

On motions, appellant was granted leave to file four typewritten copies of a reply brief herein within fifteen days from this day and appellee was granted leave to file a reply thereto within fifteen days thereafter.

Thereupon this cause was argued by counsel and was submitted to the court.

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Opinion:

[April 23, 1948.]

Reid Williams, Regional Attorney, and Bessie Margolin, Assistant Solicitor, (William S. Tyson, Solicitor, Morton Liftin and Sidney S. Berman, Attorneys, U. S. Department of Labor, were with them on the brief) for Appellant. John P. Akolt (Bancroft, Blood & Law, Frank N. Bancroft, Walter W. Blood, Brock, Akolt & Campbell, and R. A. Dick were with him on the brief) for Appellee.

Before Phillips, Bratton and Murrah, Circuit Judges.

Bratton, Circuit Judge:

By complaint filed in the United States Court for Colorado, the Administrator of the Wage and Hour Division of the Department of Labor charged that The Farmers Reservoir and Irrigation Company, a corporation, was violating the Fair Labor Standards Act, 52 Stat. 1060, 29 U.S.C.A. §201, et seq., by failing to pay certain of its em-

employees time and one-half for statutory overtime, and by failing to keep records, as required by the Act. An injunction was sought restraining continued violation. The defendant denied coverage under the Act. Entertaining the view that all of the employees involved except one were engaged in commerce or in the production of goods for commerce, and that all of such employees were engaged in agriculture, the court dismissed the action; and the administrator appealed.

The facts are not in issue. The company owns, maintains, and operates an irrigation system consisting primarily of four large storage reservoirs, a number of small reservoirs, and from 300 to 400 miles of canals. Approximately 100,000 acres of farm land is irrigated in whole or in part with water furnished by the company. The major portion of the water distributed is diverted from the public streams in Colorado during the non-irrigation season, is run through canals into the reservoirs, is released from the reservoirs, is carried through canals, and is delivered to the laterals of the farmers during the irrigation season. In addition to storage water, the company diverts from the public streams, transports through its canals, and delivers to the laterals of the farmers such other water as is available from time to time. The record title to the land upon which the reservoirs and the canals are located stands in the name of the company; and the company has a vested right fixed by judicial decrees to divert from the streams certain quantities of water as of various priority dates for use in irrigated land by its stockholders or their nominees in growing agricultural crops. The company has 10,500 shares of authorized capital stock, and each share entitles the owner thereof to an equal and pro rata share with every other share of the property of the company and of the available supply of water in the division of the system to which such stock is allocated. Each year the stockholders make an annual assessment upon the outstanding stock of the company for the purpose of raising money necessary to defray the expenses incident to the maintenance and operation of the system and for the payment of the principal and interest on the outstanding bonds of the company. The proceeds of the assessments constitute the sole source of in-



in § 210(b) of the Act, did not define the phrase "agricultural labor." Later, because of administrative rulings, Congress amended the Act by providing that it should include services performed "in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supply and storing water for farming purposes." 53 Stat. 1373, 42 U.S.C.A. § 409 (1)(3).

That action by Congress, it seems to me, throws some light on its intent with respect to the term "agriculture" used in the Fair Labor Standards Act.

*Reynolds v. Salt River Valley Water Users Ass'n*, 9 Cir., 143 F.2d 863, seems to me to be clearly distinguishable on the facts. There, the Association operated a water and electric system for the supplying of irrigation water and power in Central Arizona. Its system consisted of 5 large storage dams, 2 diversion dams, 8 hydroelectric plants, 1 steam plant, 1 Diesel plant, 1400 miles of canals and laterals, hundreds of miles of power lines, 200 deep well pumps, and other plants and equipment necessary for the operation of a water and electric utility. It had an investment of \$2,300,000 in power plants. Its employees, in addition to supplying water to farmers, were engaged in the production and transportation of electric energy for industrial purposes for profit. It was a profit-making corporation and engaged in the production and transportation of electric energy as well as in the diversion, storage, and carrying of water. Here, we have a mutual ditch company engaged, as an instrumentality of the landowners, in the maintenance and operation of ditches, canals, and reservoirs used exclusively for diverting, storing, and supplying water for agricultural purposes.

It is my opinion that the employees of the ditch company here involved, other than the bookkeeper, were engaged in practices "performed by a farmer . . . as an incident to or in conjunction with" farming operations and were within the meaning of the term "agriculture," as defined in 29 U.S.C.A. § 203(f), and were exempted from the coverage of the Act by 29 U.S.C.A. § 213(a)(6).

For the reasons indicated, I respectfully dissent.

## Judgment.

Eighty-fifth Day, November Term, Friday, April 23rd, A. D. 1948. Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Colorado and was argued by counsel.

On consideration whereof; it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby reversed; and that this cause be and the same is hereby remanded to the said district court for further proceedings not inconsistent with the views expressed in the opinion herein.

---

Petition for Rehearing.

# United States Court of Appeals

## TENTH CIRCUIT.

No. 3549.

WILLIAM R. McCOMB, Administrator of the Wage and  
- Hour Division, United States Department of Labor,  
APPELLANT,

v.

THE FARMERS RESERVOIR AND IRRIGATION  
COMPANY, a Corporation, APPELLEE.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF COLORADO.

### PETITION FOR REHEARING

Plaintiff respectfully petitions this Court to reconsider that part of its opinion in this case holding that appellee's bookkeeper and accountant is an exempt "administrative" employee under Section 13 (a) (1) of the Fair Labor Standards Act. This ruling was apparently predicated upon appellee's erroneous assertion that the salary requirement was the only qualification in question and that this deficiency had subsequently been met. (See appellee's br., pp. 42, 44.) However, the record lends no support whatsoever to appellee's claim. On the contrary, such evidence as appears in this record indicates that the bookkeeper lacked not only the salary qualification but also any of the other characteristics necessary to qualify him for the exemption. The holding that the exemption is applicable on the basis of the record in this case conflicts with the consistent line of decisions of the Supreme Court, of this Court, and of the other circuit courts of appeals.

It was stipulated (R. 23) by the parties to this suit that "defendant does not contend that Mr. Coler (the bookkeeper-accountant) is exempt under either the 'administrative' or 'executive' provisions of the Act." For that reason we did not discuss this exemption issue in our main brief. The exemption issue was not injected into this case until the filing of appellee's brief in this Court. There appellee asserted (p. 42) that "the reason for this stipulation" that Mr. Coler was not exempt was the failure to meet the salary requirement of the exemption. Appellee then asserted (p. 44) that after the decision of the court below Mr. Coler's salary had been raised to meet that requirement. This belated attempt to fit Mr. Coler within the terms of the Administrator's regulation defining and delimiting the term "employee employed in a bona fide \* \* \* administrative \* \* \* capacity" (Title 29, Code of Federal Regulations, Part 541, Section 541.2)<sup>1</sup> should not succeed for three reasons.

*First*, appellee's failure to assert the defense in the court below precludes it from now raising it here (*Jones v. Tower Production Co.* 120 F. (2d) 779, 781 (C. C. A. 10)) particularly in the light of the well settled rule that an employer claiming an exemption from this Act must both plead and prove that the exemption is applicable. *Walling v. General Industries*, 330 U.S. 545, 548; *Joseph v. Ray*, 139 F. (2d) 409, 410 (C. C. A. 10); *Schmidtke v. Conesa*, 141 F. (2d) 634 (C. C. A. 1); *Helliwell v. Haberman*, 140 F. (2d) 833, 834 (C. C. A. 2); *McComb v. Utica Knitting Co.*, 164 F. (2d) 670, (C. C. A. 2); *Fletcher v. Grinnell Bros.*, 150 F. (2d) 337, 340-341 (C. C. A. 6); *Smith v. Porter*, 143 F. (2d) 292, 294 (C. C. A. 8); *Lassiter v. Atkinson Co.*, 162 F. (2d) 774 (C. C. A. 9). See also *Federal Trade Commission v. Morton Salt Co.*, decided by the Supreme Court May 3, 1948, 16 Law Week 4419 at 4420.

*Second*, even if it be assumed that the question of the "administrative" exemption under Section 13 (a) (1) were properly before this Court, and even if the record showed Mr. Coler's salary to be \$209 per month (but cf. *third, infra*), the stipulated facts as to his duties require the conclusion that

<sup>1</sup>Published in the Federal Register, October 15, 1940 (5 F. R. 4077).



the exemption be denied." In holding the "administrative" exemption applicable the opinion of this Court appears to imply that the \$200 per month salary is the sole requirement for the exemption. By the terms of the Administrator's regulations, however, in order to qualify as an "administrative" employee an employee must meet not only the salary requirement, but also one of the four alternative requirements each of which specifies the nature of the work the "administrative" employee must perform.<sup>2</sup> As this Court has held in a previous case, the Administrator's regulations "must be regarded . . . as defining and delimiting such phrases [executive, administrative, and professional] and as setting down absolute criteria through which the question of exemptions must be determined." *Walling v. Yeakley*, 140 F. (2d) 830, 832. Therefore, although salary is a pertinent criterion, "the most pertinent test for determining whether one is a bona fide executive [or administrative employee] is the duties which he performs" (*Yeakley* case, 140 F. (2d) at 832). Measured by this "most pertinent test," appellee's bookkeeper-accountant cannot qualify for exemption. His duties as set forth in the stipulation (R. 22), as found by the lower court (R. 117), and as

<sup>2</sup>Appellee implied (brief, p. 42) that the sole reason for the stipulation that Mr. Coler was not exempt was the failure to meet the salary requirement. Nothing in the record supports this implication.

The text of the Administrator's regulation (29 C. F. R., sec. 541.2) is as follows:

"The term 'employee employed in a bona fide . . . administrative . . . capacity' in section 13 (a) (1) of the act shall mean any employee—

"(A) who is compensated for his services on a salary or fee basis at a rate of not less than \$200 per month (exclusive of board, lodging, or other facilities), and

"(B) (1) who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in these regulations), where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment; or

"(2) who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or

"(3) whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment; or

his title indicates, are primarily those of a bookkeeper. He keeps the company books, prepares the annual statement, examines and records the employees' daily work reports and checks them with the time sheets, apportions the total time shown by the monthly time sheets among all the different accounts against which the work was charged, and assists an outside certified public accountant in the annual audit of the company's books. Under the official interpretation of the Administrator's regulations, such bookkeepers are not regarded as within the exemption.<sup>4</sup>

In no part of the record in this case (or in defendant's brief) is there any showing that Mr. Coler's duties are other than those of the ordinary bookkeeper. An analysis of his duties shows an absence of the type of functions required by sections (B) (1), (2), (3) or (4) of the Administrator's regulations. (See fn. 3.) There is no evidence that Mr. Coler "regularly and directly assists" an administrative or executive employee or that his assistance is "nonmanual in nature and requires the exercise of discretion and independent judgment" as required by (B) (1). Nor is there any evidence that he performs "responsible nonmanual office or field work," requiring "the exercise of discretion and independent judgment" (B) (2). Nor is there any evidence that his work involved "the execution of special nonmanual assignments and tasks directly related to management policies . . . involving the exercise of discretion and independent judgment" (B) (3).<sup>5</sup>

"(4) who is engaged in transporting goods or passengers for hire and who performs, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties require the exercise of discretion and independent judgment."

"The Administrator's interpretation of his regulations is set forth in the "Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition." The report is reprinted at 1944-1945 W. H. Man. 674-715. This report indicates that ordinarily bookkeepers are not exempt since "bookkeeping is . . . one of the most routine of all normal business occupations." 1944-1945 W. H. Man. at 699. The Administrator's reasonable construction of his own regulations (unlike his other interpretations of the Act which are merely entitled to "great weight" (see *Skidmore v. Swift*, 323 U. S. 134)) is controlling. *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414; *Armstrong Co. v. Walling*, 161 F. (2d) 515, 517 (C. C. A. 1).

The criteria of section (B) (4) relating to transportation of goods or passengers are even more obviously inapplicable to a bookkeeper's duties.

On the contrary, Mr. Coler's duties, as disclosed by the stipulation and the findings, are predominantly manual in nature and in no way indicate any policy making or supervisory functions. Nor does the record show that his work involved the exercise of discretion and independent judgment to any extent greater than that of any ordinary bookkeeper.

When the bookkeeper's duties as found by the lower court are measured against the "absolute criteria through which the question of the exemption must be determined" it is evident that his work no more meets the requirements of the "administrative" exemption than the work of the oil pumper in *Joseph v. Ray*, 139 F. (2d) 409 (C. C. A. 10), met the requirements of the "executive" exemptions. This Court's holding in the *Ray* case, that "apart from the wage requirement, it is clear to us that the employee cannot be considered as a 'bona fide executive,' within the meaning of the definitive parts of the definition" is equally applicable to the instant case. Here, no attempt was ever made, even in appellee's brief, to show that the bookkeeper met any criteria of the exemption other than the salary test.

Third, there is no evidence in the record to show that this employee meets even the salary requirement for the exemption. The assertion in appellee's brief (p. 44) that "we now in this manner state and inform the court and the Administrator and his counsel that pursuant to a general salary increase \* \* \* which became effective on October 1, 1947 [more than six months after the opinion of the lower court] his salary since that time has been and now is \$209 per month" can hardly serve as a basis for this Court's decision. Though appellee "has briefed this appeal as though facts stated in the brief, but not shown by the record, may be given effect; it is, of course, the record alone which controls as to the facts." *Bono v. United States*, 113 F. (2d) 724, 725 (C. C. A. 2). Accord: *Schley v. Pullman Palace Car Co.*, 120 U. S. 575, 578; *Quagon v. Biddle*, 5 F. (2d) 608, 610 (C. C. A. 8); *United States v. Van Dusen*, 78 F. (2d) 121, 122 (C. C. A. 8); *Zell v. Bankers' Utilities Co.*, 77 F. (2d) 22, 26 (C. C. A. 9); *Leonard v. Field*, 71 F. (2d) 483, 487 (C. C. A. 9); *Globe & Rutgers Fire Ins. Co. v. Draper*, 66 F. (2d) 985, 989, (C. C. A. 9.)

## Conclusion.

Since (1) the issue as to the exemption was not properly before this Court; (2) the stipulated facts show that the employee fails to qualify for exemption; and (3) there is no evidence in the record to support the statement that even the salary requirement is met, there appears no sound basis for the contention that the case as to the bookkeeper is moot. The sole authority cited by appellee (*Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419) is altogether inapposite since in that case the evidence that certain violations had ceased was a part of the record and had been the subject of a specific finding by the trial court. In any event even if it clearly appeared that the employee in question now qualifies for the exemption, it is conceded by appellee (br. pp. 42, 43) that violations with respect to this employee were continuing throughout the trial in that the salary standard was not met until several months after the decision of the district court. Under these circumstances, since there is no assurance that the requirements of the exemption, consistently violated in the past, will be observed in the future, the granting of injunctive relief would be warranted. *Walling v. Mid-Continent Pipe Line Co.*, 143 F. (2d) 308 (C. C. A. 10); *Lenroot v. Interstate Bakeries Corp.*, 146 F. (2d) 325 (C. C. A. 8); *Walling v. Fairmont Creamery Co.*, 139 F. (2d) 318, 321 (C. C. A. 8); *Lenroot v. Kemp & Pitts*, 153 F. (2d) 153 (C. C. A. 5). Clearly "the case is not moot under these circumstances. \* \* \* Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power." *Walling v. Helmerich & Payne*, 323 U. S. 37, 43.

If in fact the circumstances with regard to the bookkeeper have changed, the proper procedure for appellee to follow is to apply to the district court for a reopening of the case to show the changed circumstances. *Coca-Cola Co. v. Standard Bottling Co.*, 138 F. (2d) 788 (C. C. A. 10). We therefore respectfully request that the opinion and judgment in this case be amended so as to state that the issue as to the exemption of the bookkeeper-accountant was not properly raised in this Court, or that the evidence in the record shows that the exemption was inapplicable. In either event appellee will then be free to apply to the court below for such relief as that court



may, upon a proper record and appropriate findings, see fit to grant.

Respectfully submitted.

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BESSIE MARGOLIN,  
Assistant Solicitor,  
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Attorneys,  
United States Department of  
Labor.

REID WILLIAMS, Regional Attorney.

**CERTIFICATE**

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for purposes of delay.

BESSIE MARGOLIN,  
Assistant Solicitor.

May 11, 1948.

---

Filed May 13, 1948. Robert B. Cartwright, Clerk.

## Order Denying Petition for Rehearing.

Tenth Day, May Term, Tuesday, May 25th, A. D. 1948.  
Before Honorable Orie L. Phillips, Honorable Sam G. Bratton and Honorable Alfred P. Murrah, Circuit Judges.

This cause came on to be heard on the petition of appellant for a rehearing herein and was submitted to the court.

On consideration whereof, it is now here ordered by the court that the said petition be and the same is hereby denied.

---

Clerk's Certificate.

United States Circuit Court of Appeals, Tenth Circuit.

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Circuit, do hereby certify the foregoing as a full, true, and complete copy of the designated transcript of the record from the District Court of the United States for the District of Colorado, and full, true, and complete copies of certain pleadings, record entries and proceedings, including the opinion (except full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States) had and filed in the United States Circuit Court of Appeals for the Tenth Circuit in a certain cause in said United States Circuit Court of Appeals, No. 3549, wherein William R. McComb, Administrator of the Wage and Hour Division of the United States Department of Labor, was appellant, and The Farmers Reservoir and Irrigation Company, a corporation, was appellee, as full, true, and complete as the originals of the same remain on file and of record in my office.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit, at my office in Denver, Colorado, this 11 day of June, A. D. 1948.

(Seal, U. S. Circuit  
Court of Appeals,  
Tenth Circuit)

ROBERT B. CARTWRIGHT,  
Clerk of the United States  
Circuit Court of Appeals,  
Tenth Circuit.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 128

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

---

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 196

ORDER ALLOWING CERTIORARI—Filed October 11, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(9338)

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CHARLES E. LLOYD

IN THE  
SUPREME COURT OF THE  
UNITED STATES

October Term, 1948

No. 128

THE FARMERS RESERVOIR AND IRRIGATION  
COMPANY, a Corporation, PETITIONER,

WILLIAM R. McCOMB, Administrator of the Wage and  
Hour Division of the United States Department of  
Labor, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE TENTH CIRCUIT AND BRIEF IN SUP-  
PORT THEREOF

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IN THE  
SUPREME COURT OF THE  
UNITED STATES

October Term, 1948

No.

THE FARMERS RESERVOIR AND IRRIGATION  
COMPANY, a Corporation, PETITIONER,

v.

WILLIAM R. McCOMB, Administrator of the Wage and  
Hour Division of the United States Department of  
Labor, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE TENTH CIRCUIT.

The Petitioner herein respectfully prays for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Tenth Circuit (hereinafter referred to as the Court of Appeals) entered in cause No. 3549 on the docket of said Court. Said judgment reversed a judgment in favor of Petitioner entered by the United States District Court for the District of Colorado (hereinafter referred to as the District Court). Said judgment, to which this petition is directed, holds that certain employees of Petitioner are engaged in the production of goods for commerce within the meaning of the Fair Labor Standards Act of 1938, and that said employees are not within the agricultural exemption of said Act.

### **OPINIONS BELOW**

The judgment of the District Court in favor of Petitioner was reversed by the Court of Appeals pursuant to the majority opinion of Judges Bratton and Murrah (R. 127), with Judge Phillips dissenting (R. 134). The majority and dissenting opinions of the Court of Appeals (R. 127-137) are reported in ..... Fed. (2d) (Adv. Op.) p. .... The opinion of the District Court appears in the record at page 99, et seq., and the Findings of Fact, Conclusions of Law and Decree of the District Court appear in the record at pages 99-122.

### **JURISDICTION**

The judgment of the Court of Appeals was entered April 23, 1948, with petition for rehearing (filed by the Administrator) denied May 25, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

### **STATUTE INVOLVED**

The statute involved is the Fair Labor Standards Act of 1938 (52 Stat. 1060, et seq., Title 29, U.S.C.A., Sec. 201, et seq.) (hereinafter referred to as the Act). The pertinent provisions of the Act are set forth in the Appendix, infra, pp. a, b, c and d.

### **SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED**

The Administrator of the Wage and Hour Division of the Department of Labor filed a complaint in the District Court against the Petitioner charging the Petitioner with violating the Act by failing to pay certain of its employees time and one-half for statutory overtime and by failing to keep records as required by the Act. An injunction was sought restraining continued violation. The Petitioner denied coverage under the Act. The District Court held that all the employees of the Petitioner involved, except one, were engaged in commerce or in the production of goods for commerce and that all of such employees were engaged in agriculture and, therefore, exempt under Subdivision (6) of Section 13 of the Act. The District Court, therefore, dismissed the action and the Administrator appealed. The



Court of Appeals, one Judge dissenting, reversed the District Court and held that the Petitioner's employees are engaged in the production of goods for commerce and are not within the agricultural exemption of the Act.

The case was submitted on agreed stipulation of facts (R. 11-83). Briefly summarized, the facts are as follows:

A number of years back the owners of certain dry, grazing or unproductive lands in several counties north and west of Denver, Colorado, wishing to convert their lands into irrigated farm lands, planned and conceived the construction of an irrigation system, by means of which water would be diverted from the public streams in Colorado and impounded in and carried through the reservoirs and ditches of the irrigation system and distributed therefrom for the irrigation of this land. Accordingly, the Petitioner was organized and incorporated under the laws of the State of Colorado as a *mutual ditch company*. By the owners of this land and the irrigation system was constructed, consisting primarily of four large storage reservoirs, a number of small reservoirs and from 300 to 400 miles of irrigation ditches or canals, all located in Colorado, through which approximately 100,000 acres of land are irrigated, in whole or in part, with water diverted from the public streams and impounded in and carried through the reservoirs and ditches of the system. The record title to the land upon which the reservoirs and canals are located stands in the name of Petitioner.

Acting under the Constitution and Statutes of the State of Colorado, "appropriations" of water had been made from the public streams which give the right to the appropriators of such water to divert the same from the public streams in order of time or priority as determined by "adjudication decrees" entered by courts of the State of Colorado. These decrees permit this water to be diverted from the public streams and used for irrigation purposes only.

As stated above, Petitioner is a mutual ditch company. It has 10,500 shares of authorized capital stock. Each share entitles the owner thereof to an equal and pro rata share with every other share of the available supply of water in the division of the system to which such water is

allocated. Each year the stockholders (who are the owners of the land who organized Petitioner to secure their irrigation water or their successors in interest) make an annual assessment upon the outstanding stock for the purpose of raising money necessary to defray the expenses incident to the maintenance and operation of the system and for the payment of the principal and interest on the outstanding bonds of the company, which bonds were issued in connection with the construction of the system or the acquisition of water rights. The proceeds of the assessments constitute the sole source of income of the company, with the exception of incidental income from rents for duck hunting and similar purposes on some of the reservoirs, the receipts of which operate to reduce the amount of the annual assessments. Payment of the assessments is a condition precedent to the right of a stockholder to receive water allocated to his stock. The company does not sell water and does not carry water for hire. It does not and cannot make a profit and it does not pay dividends. It is purely a mutual ditch company. Its stock is the evidence of ownership or the muniment of title showing the ownership of the water right and canals and reservoirs by the stockholder.

Irrigation is essential to the proper raising of crops on the lands of Petitioner's stockholders. Petitioner employs reservoir tenders, ditch riders and operator of a drag-line used in connection with the maintenance and repair of the reservoirs and canals and from time to time common laborers for special maintenance work. The number of such employees ranges from 16 to approximately 26. The reservoir tenders and ditch riders; collectively and interchangeably, tend to the diverting of the water from the streams, to its storage and to its conduct through the canals and into the laterals of the farmers which extend from the farms to the canals of the system. They patrol the reservoirs, canals and other appurtenant structures and keep the property in good operating order. The work of the employees is essential to the irrigation of the lands of the farmer stockholders of Petitioner.

In numerous work weeks in the year some of these employees work in excess of 40 hours and are not paid for

the overtime at the rate of one and one-half times their regular pay.

The water secured by the farmer stockholders of Petitioner through this system is used for irrigation purposes on the stockholders' farm lands in connection with the tillage of the soil and the production, cultivation, growing and harvesting of a wide variety of agricultural crops. These farm lands are highly productive and such high degree of productivity results in a substantial degree from the irrigation thereof by the use of this water by the individual farmers under the usual practices of all farmers producing agricultural crops under this irrigation system. This irrigation water is necessary for these agricultural purposes, and if this water were not available and used on the land of Petitioner's stockholders this land would cease to be irrigated farm land and would become non-irrigated, grazing or other class of land.

The complaint filed by the Administrator (R. 4) expressly alleges that Petitioner's employees are engaged "in processes and occupations necessary to the production of corn, winter wheat, spring wheat, oats, barley, potatoes, beans, sugar beets, rye, and other commodities" and that the water secured through Petitioner's system "is used and utilized \* \* \* in the irrigation and production of corn \* \* \* and other commodities \* \* \*". These facts were likewise stipulated (R. 17, et seq.).

Neither Petitioner nor any of its stockholders sell or distribute any agricultural products in interstate commerce. However, in raising these agricultural products, the stockholders do know that a substantial part of them sold locally to purchasers in Colorado, such as sugar beets, corn, beans, etc., will be processed in Colorado by the purchasers and the processed products, in substantial amounts, will be shipped outside the State of Colorado in interstate commerce, and in some instances the farmer stockholders of Petitioner know that certain of their crops sold to local purchasers will thereafter, by such purchasers, without processing, be shipped interstate.

Under the laws of the State of Colorado and practices arising thereunder, taxes are not separately levied upon

the irrigation system of a mutual ditch company, such as Petitioner, or the water or water rights connected therewith, but such irrigation system and water rights are deemed a part of the lands irrigated through the system and such lands are valued for tax purposes as irrigated land and the value of the water rights merged into the value of the irrigated lands.

The District Court found that the Petitioner is merely the agent of its stockholders and that the employees of Petitioner have been and are, in truth and in fact, through and by reason of this agency, for all intents and purposes, employees of the farmer stockholders of Petitioner and are engaged and employed in the irrigation and production and in practices and occupations necessary to the production of agricultural and horticultural crops and commodities (R. 119).

The District Court found that all of Petitioner's employees involved, with the exception of one bookkeeper, were engaged in the production of goods for commerce within the meaning of the Act, but further found that all of said employees were "employed in agriculture" as defined in the Act, and therefore, exempt from its coverage. Upon these findings the complaint of the Administrator was dismissed.

The Court of Appeals held that the said employees of Petitioner are engaged in the production of goods (agricultural) for commerce within the meaning of the Act, but, by a two to one opinion, reversed the District Court and held that said employees are not employed in "agriculture" as defined in the Act and thereby raises the only question that we wish to present to this Court in this petition for a writ of certiorari, namely,



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## QUESTION PRESENTED

WHEN, BY COMMON KNOWLEDGE AND JUDICIAL NOTICE, IRRIGATION, THROUGH THE DIVERSION OF WATER FROM THE PUBLIC STREAMS AND THE APPLICATION THEREOF TO LAND, IS NECESSARY FOR THE PROPER RAISING OF AGRICULTURAL CROPS THROUGHOUT ALL THE SEMI-ARID STATES IN THE WESTERN PART OF THE UNITED STATES, INCLUDING COLORADO AND INCLUDING LANDS OF PETITIONER'S FARMER STOCKHOLDERS, WHICH FACT IN THIS PARTICULAR CASE IS CONCLUSIVELY ESTABLISHED BY THE ADMINISTRATOR'S COMPLAINT, THE STIPULATED FACTS, THE FINDINGS OF THE TRIAL COURT AND THE OPINION OF THE COURT OF APPEALS, ARE MEN EMPLOYED BY MUTUAL DITCH COMPANIES, SUCH AS PETITIONER, WHICH ARE ORGANIZED BY THE FARMERS, AS A MATTER OF CONVENIENCE, FOR THE PURPOSE OF SECURING SUCH IRRIGATION WATER, AND WHOSE WORK CONSISTS EXCLUSIVELY OF THE DIVERSION OF WATER OWNED BY THE FARMERS FROM THE PUBLIC STREAMS AND THE MAINTENANCE AND OPERATION OF THE IRRIGATION DITCHES AND RESERVOIRS AND THE TRANSPORTATION OF THE WATER THERE-THROUGH AND THE DELIVERY THEREOF TO THE FARM IRRIGATION LATERALS FOR THE RAISING OF AGRICULTURAL CROPS, ENGAGED IN "AGRICULTURE" AS THAT TERM IS DEFINED IN THE FAIR LABOR STANDARDS ACT OF 1938?

### SPECIAL AND IMPORTANT REASONS RELIED ON FOR GRANTING THE WRIT OF CERTIORARI HEREIN

In conformity with the requirements of the applicable Rules of this Court, the special, important and substantial reasons, discussed with greater particularity in the short brief of the argument hereto attached, which, it is contended, should move this Court to allow the Writ of Certiorari herein sought, are as follows:

1. As shown in the summary statement, supra, Petitioner's employees are not engaged in commerce. The Court of Appeals, however, has held that they are engaged in the production of goods for commerce and are, therefore, within the general coverage of the Fair Labor Standards Act. These employees do work necessary to diverting water from the public streams and impounding and transporting it through the reservoirs and canals of the Petitioner's irrigation system and delivering it to the farmer stockholders of Petitioner for the irrigation of their lands, as a result of which agricultural crops are raised. The farmer stockholders of Petitioner, however, do not sell or transport any of

said agricultural products in interstate commerce. They do know that a substantial part of their crops, when sold to local purchasers in Colorado, will be processed in Colorado and the processed product sold or transported in interstate commerce. They also know that some part of their agricultural products, when sold to a local purchaser in Colorado, will be sold or transported by that purchaser in interstate commerce without processing.

The court below has held that Petitioner's employees are engaged in the production of goods for commerce in reliance upon the test laid down by this Court in *Kirschbaum Co. v. Walling*, 316 U. S. 517, 525, 526, 62 S. Ct. 1116, 86 L. Ed. 1638, 1649, and other cases of like effect, which make the question dependent upon whether the employees' work has "such a close and immediate tie with the process of production for commerce and was therefore so much an essential part of it that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce'".

We submit that if Petitioner's employees are engaged in the production of goods, whether or not for commerce, then those goods, in the production of which they are engaged, are necessarily agricultural goods and the ruling of the Court of Appeals that these employees are engaged in the production of goods for commerce and still are not employed in agriculture is absolutely inconsistent and contradictory.

The ruling of the Court of Appeals that Petitioner's employees are engaged in the production of goods for commerce, namely, agricultural goods, and are, therefore, within the general coverage of the Act and are, nevertheless, not employed in agriculture is illogical. Anyone who is engaged in the production of agricultural goods for commerce must, it is submitted, necessarily be employed in agriculture. This obvious inconsistency and contradiction in the ruling of the Court of Appeals requires, we submit, a determination and clarification by this Court as to the meaning of the term "agriculture" as used in the Act, and as to whether irrigation is not within the definition of agriculture, and as to

whether those who are employed in irrigation are not employed in agriculture within the meaning of the Act.

The above specific question has not as yet been decided by this Court. It is a question which should be settled in the interest of the proper administration of the Act. As we will hereinafter point out, it is not of mere local interest to your Petitioner, but is of great public importance to all the semi-arid states in the western part of the United States where agricultural crops are primarily produced through the means of irrigation by mutual irrigation or ditch companies.

2. Subdivision (a) (6) of Section 13 of the Act expressly provides that the wage and hour provisions of Section 7 shall not apply to "any employee employed in agriculture". Section 3 (f) of the Act, which defines "agriculture", is set forth in the Appendix.

The employees of Petitioner, such as its ditch riders, lake tenders and maintenance men, are engaged in irrigation. This irrigation is essential to the production of agricultural crops. It unquestionably is a branch of farming. Section 3. (f) of the Act specifically states that agriculture includes "farming in all its branches". Notwithstanding this clear language of the Act, the Court of Appeals has held that the Petitioner's employees in this case involved are not employed in agriculture. The reason assigned in the majority opinion of the Court of Appeals for this ruling is that the Petitioner is a corporate entity separate and distinct from its farmer stockholders and that the employees involved are employees of Petitioner and not of the farmers (R. 132).

Even if this be true, Petitioner submits it is immaterial because, irrespective of who the employer may be, these men are, nevertheless, employed in agriculture.

3. The majority opinion of the Court of Appeals in this case, in basing its holding that Petitioner's employees are not engaged in agriculture because of the fact that Petitioner is a corporate entity and the Court's statement that it is separate and distinct from its farmer stockholders, rather than upon the character of work performed by these

employees, conflicts with the opinions of this Court in *Overstreet v. North Shore Corp.* 318 U. S. 125, 87 L. Ed. 656, 663, *Kirschbaum Co. v. Walling*, 316 U. S. 524, 86 L. Ed. 1648, *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, which are all to the effect that the nature of the employer's business is not determinative, but the application of the Act depends upon the character of the employee's activities.

It is further submitted that even if Petitioner should properly be treated in this case as a corporate entity separate and distinct from its farmer stockholders, nevertheless, it remains the fact that any business that the Petitioner can be said to be engaged in is irrigation of farm lands for the raising of crops and, consequently, agriculture, and its employees must, therefore, likewise be engaged in agriculture.

4. One outstanding error in the majority opinion of the Court of Appeals is its statement and ruling based thereon that Petitioner is a corporate entity separate and distinct from its farmer stockholders. It is true that it is a corporate entity. What the majority opinion of the Court of Appeals fails to recognize, however, is the nature of Petitioner as a mutual ditch company. A mutual ditch company is not the ordinary type of corporation. It is a non-profit company. True, it owns the record title to the land on which the reservoirs and irrigation canals are constructed, but it holds such record title in trust for its stockholders and as their agent. It does not have any beneficial interest in said property. It does not own the water rights or the water impounded in or carried through the irrigation system. That ownership is vested in the farmer stockholders of Petitioner. These farmer stockholders so owning these water rights organized Petitioner as a mutual ditch company as a matter of convenience and as their agent for the purpose of diverting their water from the public streams and carrying it to the farm land for irrigation purposes. - The stock of Petitioner, which is issued to the stockholders of Petitioner, merely evidences each stockholder's proportionate ownership in the water rights and the waters transported through the system and in the canals and reservoirs constituting the irrigation system. These stock certificates are the stock-



holders' contributions of title covering their proportionate ownership in the water rights and irrigation system. Petitioner does no separate independent business. It is not engaged in any industry. It does not sell water or carry water for hire. It has no income, except the annual assessments which the farmers levy upon themselves to defray the maintenance and operation expense of the system. It cannot make any profits and cannot pay any dividends. It is nothing more than the farmers themselves acting through their created agency. The Court will take judicial notice that irrigation, through the medium of mutual irrigation companies such as Petitioner, is common throughout all of the semi-arid western states. Section 3 (f) of the Act includes within the definition of agriculture "any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations". Clearly, irrigation of the lands of the farmer stockholders of Petitioner through its mutual irrigation system is such a practice performed by the farmer stockholders of Petitioner in conjunction with their farming operations.

Looking at the situation realistically and factually, Petitioner's employees are, in substance, the employees of the landowners who are the farmer stockholders of Petitioner. This is recognized in the dissenting opinion of the Court of Appeals (R. 134) and also recognized by the District Court in its opinion (R. 106) and in its findings (R. 120) and is the logical conclusion to be drawn from the uniform decisions of all courts in Colorado and elsewhere which have considered the nature of a mutual irrigation company. The majority opinion of the Court of Appeals fails to recognize this realistic and factual situation.

5. The majority opinion of the Court of Appeals (R. 131) states that the agricultural exemption in the Act "is to be narrowly construed" and (R. 132) "one asserting that its employees are exempt from the wage and hour provisions of the Act has the burden of showing affirmatively that they come clearly within an exemption provision".

It is submitted that the above statements as applied to the facts in this case are in conflict with the decision of the

Circuit Court of Appeals for the Second Circuit in *Danutz v. Pinchbeck*, 158 F. (2d) 882, 883, where it is stated.

"Although this exemption provision in a remedial statute should be construed strictly, it should, of course, be given due effect. It is drawn in far reaching language which shows the intent of Congress to make the term 'agriculture' cover much more than what might be called ordinary farming activity and that is what now controls. Different definitions of 'agriculture' in other statutes but indicate different Congressional methods in dealing with other matters and cannot serve to narrow the scope of this one."

and are also in conflict with the decision of the Fifth Circuit in *U. S. v. Turner Turpentine Co.*, 111 F. (2d) 400, 404, where it is stated:

"When Congress in passing an act like the Social Security Act uses, in laying down a broad general policy of exclusion, the term 'of' as general import as 'agricultural labor' it must be considered that it intended the term to have a meaning broad enough to embrace agricultural labor of every kind, as that term is understood in the various sections of the United States where the act operates, but a mere local custom which is in the face of the meaning of a general term used in the act cannot be read into the act to vary its terms. Social Security Act, sec. 811, as amended Aug. 10, 1939, 42 U.S.C.A. sec. 1011."

6. The District Court upon evidence introduced found as a fact that Petitioner's employees are employed in agriculture. The Court of Appeals had no power or right to reverse that finding of fact. In doing so it brings its decision and opinion in conflict with the decision and opinion of the Eighth Circuit in *Walling, Administrator, etc., v. Rocklin*, 132 F. (2d) 3, which holds that the trial court's finding that employer and employees were exclusively engaged in agriculture within the exemption of the Act should not be disturbed unless clearly erroneous.

7. The question as to whether irrigation is agriculture as that term is defined in the Act and the question as to

whether employees of mutual ditch companies such as Petitioner are employed in agriculture are matters of great public importance to farming operations in all of the semi-arid western states where irrigation is essential to the raising of agricultural crops.

8. The Court of Appeals in this case has decided important questions of federal law which have not been, but which Petitioner submits should be, settled by this Court.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This memorandum brief is respectfully submitted in support of the foregoing petition for writ of certiorari.

### JURISDICTION

The ground on which jurisdiction of this Court is invoked is set forth at page 2, *supra*.

### STATUTE INVOLVED

The Fair Labor Standards Act of 1938 (52 Stat. 1060, et seq., Title 29, U.S.C.A., Sec. 201, et seq.) is the statute involved.

### CONCISE STATEMENT OF THE CASE

A summary and short statement of the matter involved is set forth in the petition, page 2, *supra*, reference to which is hereby made.

The case was submitted to the District Court under a stipulation of facts (R. 11). The summary of the case, as outlined in the petition, *supra*, is taken from the stipulation of facts and the findings of the trial court (R. 106). The facts, as set forth in the majority opinion of the Court of Appeals, other than the nature of Petitioner as a mutual ditch company and the ultimate finding that Petitioner's employees are engaged in the production of goods for commerce and are not employed in agriculture, are consistent with the stipulation of facts and the findings of the trial court.

While there is a serious question in our mind as to the correctness of the holding of the Court of Appeals that Petitioner's employees are engaged in the production of goods for commerce and, therefore, within the general coverage of the Act, this petition is limited to the one question as to whether these employees are not "employed in agriculture" as that term is defined in the Act and are, therefore, exempt from its provisions under Section 13 (a) (6).

We have set forth in the petition the various reasons why petition for the writ should be granted. We will now,



in as brief and concise a manner as possible, elaborate upon those reasons, with citation of supporting authorities.

### ARGUMENT

Petitioner's employees are employed in "agriculture" and are, therefore, exempt from the provisions of the Act under Section 13 (a) (6) thereof

We will summarize our argument under indicative sub-headings.

#### I.

Courts will take judicial notice of the fact that in the semi-arid regions of the United States (which includes Colorado) agricultural crops are not and cannot be raised without irrigation (supplying land with water by canals, ditches and reservoirs)

*Reynolds v. Salt River*, 143 P. (2d) 863

*Willey v. Decker*, (Wyo.) 73 P. 210

*Long on Irrigation*, Second Ed., Sec. 3

*Coffin v. Left Hand Ditch Co.*, 6 Colo. 443

*Koger v. Woods*, (New Mex.) 31 P. (2d) 256

*Yunker v. Nichols*, 1 Colo. 551, 553

*Perkins County v. Graff*, 114 F. 441

Within the permissible length of this brief, it is not feasible to quote from all of the above authorities. The following, however, is taken from the opinion of the Colorado Supreme Court in *Yunker v. Nichols*, supra, handed down in 1872 while Colorado was still a territory, and which has been affirmed and reaffirmed as the basis of all subsequent "water law" in Colorado:

"In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law. The value and usefulness of agricultural lands, in this territory, depend upon the supply of water for irrigation, and this can only be obtained by constructing artificial channels through which it may flow over adjacent lands. These artificial

channels are often of great length, and rarely within the lands of a single proprietor. A riparian owner must usually get his supply of water from some point on the stream above his own land, and he is compelled to enter upon the lands of others in order to obtain it. Irrigating ditches cannot be made available at or near the head or point of divergence from the stream, and, while a riparian owner may be able to construct a ditch upon his own territory which shall overflow a portion of his land, he can never make it serviceable to the entire tract. Of course, lands situated at a distance from a stream cannot be irrigated without passing over intermediate lands, and thus all tilled lands, wherever situated, are subject to the same necessity. In other lands, where the rain falls upon the just and the unjust, this necessity is unknown, and is not recognized by the law. But here the law has made provisions for this necessity, by withholding from the land-owner the absolute dominion of his estate, which would enable him to deny the right of others to enter upon it for the purpose of obtaining needed supplies of water. \* \* \*

In *Reynolds v. Salt River Valley Water Users Assn.*, 143 F. (2d) 863, the Ninth Circuit had under consideration the applicability of this Act to the Salt River Valley Water Users Association which was engaged, not only in irrigation, but in the furnishing of water interstate. No exemption was claimed on account of the agricultural exemption in the Act. However, as applied to the raising of crops in Arizona, the opinion of the Ninth Circuit in this case is replete with applicable statement of facts similar to those in the present case and to facts of which that court took judicial notice and of which we submit this court will take judicial notice as to the relationship of irrigation to agriculture where in Arizona, as well as in Colorado, irrigation is essential to and constitutes an integral part of the production of agricultural crops.

As indicating that the Ninth Circuit in that case would have construed the agricultural exemption in the Act to be applicable if the exemption had been claimed and if the

company's operations were limited to irrigation, we quote from the footnote on page 866 of the Federal report:

"Appellee did not make the affirmative plea that its employees were 'employed in agriculture' within the exemption of section 13 (a) (6) of the Act. That question was not raised here or in the court below. It is a question which well may affect the practice and rulings of the Wages and Hours Division of the Department of Labor in the performance of its functions under the Act. Our decision is without prejudice to the disposition of the question wherever appropriately presented." *Blair v. Oesterlein*, 275 U. S. 220, 225, 48 S. Ct. 87, 89, 72 L. Ed. 249."

## II.

**The Administrator's contention and the ruling of the Court of Appeals that Petitioner's employees are engaged in the production of goods for commerce constitutes an effective admission that these employees are employed in agriculture**

The majority opinion of the Court of Appeals holds on the basis of the cases cited that Petitioner's employees' work is so intimately and essentially connected with the production of goods for commerce that those employees are within the general coverage of the Act. It is clear that these employees are not directly engaged in commerce. The holding is that they are engaged in the production of goods for commerce. The Administrator alleges in his complaint (R. 4), which is admitted by Petitioner in its answer (R. 7), agreed to in the stipulation of facts (R. 16-21), found by the trial court in its findings of fact (R. 114-115) and likewise found by the Court of Appeals (R. 128-132) that Petitioner's employees are employed in processes and occupations necessary to the production and in the production of agricultural goods such as "winter wheat, spring wheat, oats, barley, potatoes, beans, sugar beets, rye and other commodities". This, we submit, is an admission, agreement and finding that Petitioner's employees produce agricultural goods, whether they are produced for interstate commerce or not, and there is no allegation and no proof and no finding of the Court that any *other goods* have been produced by Petitioner's employees for commerce or for

any other purpose. Unquestionably, these goods produced by Petitioner's employees are agricultural goods, which establishes the fact that said employees are employed in agriculture and are exempt from the Act under Section 13 (a). (6).

We submit, therefore, that the holding of the Court of Appeals that Petitioner's employees are engaged in the production of goods for commerce must necessarily be grounded upon the finding that they are engaged in the production of agricultural goods for commerce, which cannot be anything but agriculture, and must necessarily, for this reason alone, bring the Petitioner's employees within the agricultural exclusion of the Act.

The holding of the Court of Appeals that Petitioner's employees are engaged in the production of agricultural goods and still are not engaged in agriculture, we submit, is illogical, inconsistent and contradictory. If they are within the coverage of the Act at all, it is because they are engaged in the production of agricultural goods. They cannot be engaged in the production of agricultural goods unless they are engaged in agriculture.

### III.

The conclusion that Petitioner's employees are employed in agriculture within the meaning of the Act is required, not only by the allegations of the Administrator's complaint, the stipulation of facts, the findings of the trial court and the language of the Court of Appeals as to the nature of the work performed by Petitioner's employees, but also by an analysis of the language of the Act itself and the administrative rules and regulations of the Administrator, which analysis now follows

(a) *The term "production" as used in different sections of the Act must necessarily have the same meaning*

Section 3 of the Act (Title 29, Sec. 203) containing the definitions of the different terms used throughout the Act provides:

*As used in sections 201-219 of this title, (which includes the agricultural section, Title 29, Sec. 213)*



“(j) ‘Produced’ means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in *producing*, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the *production* thereof, in any State.” (Emphasis supplied).

It will be noted that the word “produced”, as defined in Section 3 (j) of the Act, is made applicable to that word as used throughout all the Sections of the Act, including Section 3 (f) defining “agriculture,” which reads as follows:

“(f) ‘Agriculture’ includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the *production*, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.” (Emphasis supplied).

We submit that a different meaning cannot be given to “production” when used in the same statute and, in fact, in the same section of the statute when Congress expressly stated in the preamble to that section that the defined meaning should be applicable when used throughout the entire statute. It must of necessity logically follow that the word “production” in Section 3 (f) and the same word in section 3 (j) have the same meaning. If, therefore, the work in which Petitioner’s employees are engaged is “production” within the meaning of Section 3 (j) so as to bring such employees within the commerce coverage of the Act, that same work must necessarily be “production” within the meaning

of Section 3 (f) that excludes such work from the coverage of the Act.

These employees are engaged in only one line of work and as it has been held by the Court of Appeals that this line of work is the production of agricultural goods for commerce then certainly, both logically and legally, it must follow that they are engaged in the "production" of those same agricultural goods as the word "production" is included in the definition of agriculture in Section 3 (f). The same logical and legal principle and construction which the Court of Appeals felt justified its ruling that Petitioner's employees are engaged in the production of goods for commerce impels the conclusion that they are employed in agriculture.

(b) *"Agriculture" includes farming in all its branches. Congress intended to give a broad, rather than a limited, construction to its definition of the word "agriculture"*

The first few words of the definition of "agriculture" in Section 3 (f) of the Act states that agriculture includes *"farming in all its branches"*. We hardly think it proper to refer to "irrigation" as a "branch" of agriculture in Colorado or other western semi-arid states. We submit that irrigation is one of the four essential ingredients of agriculture, which, combined, are necessary to constitute agriculture. These are: (1) land; (2) seeds; (3) irrigation; (4) manpower. Without these and each of them there could not be agriculture or agricultural crops in any proper sense of the word in the semi-arid states, such as Colorado, where the application of water, through irrigation, is essential to the raising of the crops. If, however, irrigation should not be considered as one of the constituent elements of agriculture, it, nevertheless, should be considered as one of the branches of farming referred to in the definition of agriculture in the Act.

The first words indicating a broad interpretation of agriculture are "agriculture includes farming in all its branches". This broad phrase includes all farms in all sections of the United States, and it also includes all the varying methods and practices employed by farmers in all

sections of the United States, in order that these farmers may successfully raise crops under all of the diversified climatic and physical conditions that exist in all sections of the United States,—in those that have an over supply of rain, in those that have practically no supply of rain, and in those where rain is not sufficient for the raising of crops without a supplemental supply of water by irrigation. It will be noted that this broad phrase “farming in all its branches” is followed by the words “and among other things includes the production, cultivation, growing and harvesting of any agricultural or horticultural commodities”, and so forth. This added clause, where certain activities are enumerated, serves to emphasize the intent of Congress of giving the words “farming in all its branches” a very broad meaning. The enumeration of the particular activities does not confine the first broad phrase to the particular activities, but rather enlarges the meaning of the first broad phrase, “farming in all its branches”.

We submit that the majority opinion is in error (R. 131-132) in holding that the agricultural exemption in the Act should be “narrowly construed” when the Act itself says that agriculture “includes farming in *all its branches*” and when, beyond question, irrigation is some branch of farming. That such a narrow construction of the term “agriculture” should not be applied is the holding of the Second Circuit in *Damutz v. Pinchbeck, Inc.*, 158 F. (2d) 882, and the holding of the Fifth Circuit in *U. S. v. Turner Turpentine Co.*, 111 F. (2d) 400, which are cited and quoted in the petition on page 12, *supra*, reference to which quotations are here made rather than repetition.

That a broad interpretation should be given to the term “agriculture” as used in the Act is further indicated by the following taken from the Congressional Record, Volume 83, Page 9162, when Senator Thomas from Utah presented the revised bill for approval by the Senate. The following discussion of the agricultural definition took place:

“Mr. Johnson of California: ‘I said that, in general language, agriculture is exempted from the operation of the bill.’

“Mr. Thomas of Utah: ‘It is.’

“Mr. Johnson of California: ‘Does the Senator know of any particular kind of agriculture that is included in the bill?’

“Mr. Thomas of Utah: ‘I do not know of any. The definition seems to be all-inclusive, and we tried to make it so.’”

In addition to the above, we have in this case the finding of the trial court that Petitioner's employees are employed in agriculture. Under the rule announced by the Eighth Circuit in *Walling v. Rocklin*, 132 F. (2d) 3, the Court of Appeals had no right nor power to set aside that finding unless it was clearly erroneous. Our position is that the finding of the trial court was not clearly erroneous, or erroneous at all, but was entirely correct on the facts, which were stipulated.

Assuming that irrigation is not one of the main essential ingredients of agriculture and, therefore, agriculture itself, then the following cases, along with those cited above and those hereinafter cited, clearly show that irrigation, not only in Colorado, but in all the semi-arid states of the west, is at least a “branch” of agriculture and is, therefore, within the definition of “agriculture” set forth in the Act.

*Platte Water Co. v. Northern Colorado Irrigation Co.*, 12 Colo. 525, 529, 21 P. 711:

“The word irrigation, in its primary sense, is defined ‘a sprinkling, or watering;’ yet, according to the best lexicographers, it has an agricultural or special signification: ‘The watering of lands by drains or channels.’ Worcester. ‘The operation of causing water to flow over lands for nourishing plants.’ Webster. Considering the history of Colorado, the nature of its soil and climate, its constitutional and legislative enactments, as well as the decisions of our courts, we have no hesitation in saying that our legislators used the term ‘irrigation’ in the acts under consideration according to the common parlance of our people,—in its special sense,—as denoting the application of water to lands for the raising of agricultural crops and other products of the soil.”



*Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446:

" \* \* \* It has always been the policy of the national, as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. \* \* \* "

*Moyer v. Preston*, 44 P. 845; 847, 6 Wyo. 308:

"The soil is arid, and largely unproductive in the absence of irrigation, but, when water is applied by that means, it becomes capable of successful cultivation."

*Clough v. Wing*, 2 Ariz. 371, 17 P. 453, quoting from the syllabus:

"In Arizona, all the waters of non-navigable streams are devoted to agriculture by means of irrigation."

*Barnes v. Sabron*, 10 Nev. 217:

"In a dry, arid country like Nevada, where the rains are insufficient to moisten the earth, and irrigation becomes necessary for the successful raising of crops, \* \* \* "

(c) "*Agriculture*" includes *Cultivation and Tillage of the Soil*.

The second line of the definition of "agriculture" in the Act so states. Interpretative Bulletin No. 14 of the Wage and Hour Division (R. 59-81) so states and further states (R. 63):

"3. The term 'cultivation and tillage of the soil' includes all the operations necessary to prepare a suitable seedbed, eliminate competing weed growth and improve the physical condition of the soil."

Certainly, under the stipulated facts and the findings of the trial court and by way of judicial knowledge, irrigation, including the services of Petitioner's employees in connection therewith, is an operation necessary to prepare a suitable seedbed, etc., within the interpretative administrative ruling

of the Wage and Hour Division. An instructive discussion of this question is found in the opinion of the First Circuit in *Bosque v. Gonzalez*, 117 F. (2d) 11.

(d) "Agriculture" includes "production, cultivation, growing and harvesting of all agricultural or horticultural commodities".

So states the third and fourth lines of the definition of "agriculture" in Section 3 of the Act. In support of this we cite, in addition to the other applicable cases heretofore and hereinafter cited, the following:

*Walling v. Rocklin*, 44 Fed. Supp. 355

*Walling v. Rocklin*, 132 F. (2d) 3

*Reynolds v. Salt River*, 143 F. (2d) 863

*Jordan v. Stark Bros.*, 45 Fed. Supp. 769

Para. 5 (a), (b), page 5; *Interpretative Bulletin 14* (R. 63).

It will be kept in mind that the reason the Administrator claims that the Petitioner's employees are subject to the Act is because he contends they are engaged in the production of goods for commerce. If so, then we submit that production is the production of agricultural commodities, which is agriculture within the express words of the statutory definition of that term. Again, the Wage and Hour Division in its *Interpretative Bulletin No. 14*, paragraphs 5(a) and (b), page 5 (R. 63, 64), expressly so states.

(e) "Agriculture" includes all practices performed by a farmer as an incident to or in conjunction with such farming operations.

Congress again so states in Section 3 (f) of the Act. The courts have likewise so held, as well as the Wage and Hour Division in its *Interpretative Bulletin No. 14*.

*Walling v. Rocklin*, 132 F. (2d) 3

Par. 10, page 7; *Interpretative Bulletin No. 14* (R. 65).

Par. 10 (f), page 9; *Interpretative Bulletin No. 14* (R. 67).

(f) "Agriculture" includes "any process or occupation necessary to the production of goods in any State."

This again is so stated in Section 3 (f) of the Act. It is supported by the authorities:

*Reynolds v. Salt River*, 143 F. (2d) 863.

*Cook v. Massey*, 220 P. 1088 (Idaho); 38 Idaho 264.

It is specifically alleged in paragraph IV of the Complaint (R. 4) and in the stipulated facts (R. 17, 20) and the findings of the trial court (R. 112, 115, 119, 120):

(g) "*Produced*" means "*produced, manufactured \* \* \* or in any other manner worked on in any state; and for the purpose of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, \* \* \* or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any state.*"

The above is a quotation from Section 3 (j) of the Act which defines the word "*produced*" as used in the previous definition of the word "*agriculture*" in Section 3 (f). Certainly, even though it might be considered that irrigation is not in itself a part of agriculture (which construction seems unsound to us), it, nevertheless, under the Complaint filed in this action, the stipulated facts, the findings of the trial court, the reported decisions and the court's judicial knowledge, is a "process or occupation necessary to the production" of agricultural products and is, therefore, within the statutory definitions of "*agriculture*". This is supported by the following, among other cases:

*Walling v. Rocklin*, 132 F. (2d) 3

*Kirschbaum v. Walling*, 62 Sup. Ct. Rep. 1116

*Jordan v. Stark Bros.*, 45 Fed. Supp. 769

*Walling v. Amidon*, 59 Fed. Supp. 294 (Dist. Ct. Colo.).

(h) "*Goods*," as defined by the Act, means "*goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof.*"

## Section 3 (i).

If Petitioner's employees are engaged in the production of "goods" for commerce, then clearly agricultural products are "goods" and, as we will now point out, the water furnished for the irrigation of crops is an "ingredient thereof".

(i) "*Ingredient*" means that which enters in to a compound or is a component part of any combination or mixture; an element; a constituent.

Webster's Unabridged Dictionary.

See discussion in *Walling v. Amidon*, 59, Fed. Supp. 294, Dist. Ct. Colo.

(j) "Water" is a part and an ingredient of agricultural crops.

*Reynolds v. Salt River Valley Water Users Ass'n*, 143 F. (2d) 863.

(k) "All employees who are engaged in 'the production of goods for commerce' and who do any of the things included in the definition of the word 'agriculture' and referred to under preceding headings are necessarily 'employees employed in agriculture' and are exempt from Sections 6 and 7 of the Act."

Sec. 13 (a) (6) of the Act.

(l) "Irrigation labor is the same as agricultural labor."

*State v. Tiffany*, 87 P. 933 (Wash.)

*Big Wood Canal Co. v. Unemployment Compensation*, 100 P. (2d) 49

*U. S. v. Turner Turpentine Co.*, 111 F. (2d) 400.

The Idaho Supreme Court in the *Big Wood Canal Co.* case states:

"\* \* \* Irrigating the land is as much agricultural labor as is the plowing, grading, and cultivating the land after it is cleared of the sagebrush and greasewood. In the arid regions of the west, water is the vitalizing element of agriculture. \* \* \*



IV.

The Colorado Constitution and statutes permit the diversion of water from the public streams for agricultural purposes. The decrees entered by the courts of Colorado under the water adjudication statutes have decreed this water for exclusive use for agricultural purposes. This conclusively establishes that the Petitioner's employees while engaged in the diversion of this water from the public streams, transportation thereof through the Petitioner's canals, the storage thereof in the Petitioner's reservoirs, and the distribution thereof from the canals and reservoirs to the farmers for irrigation purposes are necessarily engaged in agriculture.

Article XVI, Secs. 5 and 6, Colorado Constitution  
Water Adjudication Statutes, Articles 8 to 11,  
Chap. 90, 1935 Colorado Statutes Annotated

Samples of decrees to Petitioner's canals and reservoirs attached to "Stipulation and Agreement as to Certain Facts" filed herein as Exhibits 3 and 3A. (R. 40-56).

It will be noted that these decrees only permit the Petitioner (petitioner, under the Colorado laws and court decisions, acts only for and in behalf of the farmers who apply the water to the raising of their crops) to divert the water from the public streams of Colorado for irrigation and agricultural purposes and incidents thereto (R. 41, 42, 43, 47, 48, 51, 52, 54). We submit that, when water from the public streams of Colorado can, pursuant to the constitution and statutes of the State of Colorado and the court adjudication decrees entered under such constitution and statutes, be diverted from the public streams of Colorado only for agricultural purposes, the men who are employed (by whomsoever employed) for the purpose of diverting that water from the public streams and seeing that it gets to the farmers for use in the production of their agricultural crops are necessarily engaged in agriculture.

## V.

The Court of Appeals has misconceived the nature of Petitioner and the relationship of Petitioner and its employees to its farmer stockholders in the production of agricultural crops. Petitioner, as a mutual ditch company, is merely the agent or trustee for the farmers who are the real owners of the water rights, including the ditches and reservoirs, and Petitioner's employees are, in substance, the employees of the farmers.

The majority opinion of the Court of Appeals (R. 132-133) grounds its holding that Petitioner's employees are not employed in agriculture within the meaning of that term as defined in the Act because Petitioner "is a corporate entity, separate and distinct from the farmers to whom it furnishes water for irrigation". We submit that even if this be true, Petitioner's employees, nevertheless, are engaged in irrigation, which is agriculture. As stated by this Court in a number of cases, it is the character of work performed by the employees rather than the nature of the employer which determines whether the employee is or is not subject to the Act or is or is not within one of the exemptions in the Act. *Overstreet v. North Shore Corp.*, 318 U. S. 125, 87 L. Ed. 656, 663, *Kirschbaum Co. v. Walling*, 316 U. S. 524, 86 L. Ed. 1648, *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, *McLeod v. Threlkeld*, 319 U. S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538, 1542, 1544.

However, if the nature of the employer be at all material to the question as to whether Petitioner's employees are employed in agriculture, then we submit that the basic premise of the Court of Appeals that Petitioner is a corporate entity "separate and distinct from the farmers to whom it furnishes water for irrigation" is absolutely erroneous. We most earnestly solicit the careful analysis by this Court of the real nature of Petitioner inasmuch as the Court of Appeals' reversal of the District Court is based upon the above statement.

Admittedly, Petitioner is a mutual irrigation company. The majority opinion of the Court of Appeals so states (R. 132) and then makes no further reference to the facts

or the findings of the law as to what a mutual irrigation company is:

The dissenting opinion, to which we respectfully direct the Court's attention, as well as the opinion of the District Court, (R. 99-106) correctly analyzes the nature of a mutual irrigation company.

The facts showing the true nature of Petitioner as a mutual ditch or irrigation company are covered and established by the stipulation of facts upon which this case was tried (R. 11-83). These facts are summarized in the Summary Statement set forth in the petition, page 2, supra, reference to which is here made.

The decisions, not only in the Colorado courts, but in the other western states, as well as the water right textbooks, clearly point out the unique character of mutual ditch or irrigation companies. The rules of this court limiting the length of this brief will not permit us to quote from all of these decisions and textbooks. The following quotation from the opinion of the Colorado Supreme Court in *Beatty v. Board of County Commissioners of Otero County*, 101 Colo. 346, 73 P. (2d) 982, 985, is typical of the description of a mutual ditch company in numerous decisions:

\* \* \* It definitely appears that this mutual canal company was organized for the convenience of its members in the distribution to them of their water for use upon their lands in proportion to their respective interests. Under these circumstances, the stock certificates of the canal company, in the form in which they were issued and held by the plaintiff, were merely the muniments of title to her water right, which water right, the thing of value owned by her, unquestionably was real estate and not corporate stock. This rule was clearly stated by Mr. Justice Butler in his concurring opinion, in which the majority of the court joined, in the case of *Constock v. Olney Springs Drainage District*, 97 Colo. 416, 50 P. (2d) 531, 532, where it is said: 'Counsel for the plaintiff in error admit—and it is the law—that water rights for irrigation are real property. They say however,

that shares of stock are personal property. That is true of shares of stock in corporations, including irrigation corporations, organized for profit; but where the company is a mutual irrigation company, or, as here, a mutual reservoir company, organized, not for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water upon their lands in proportion to their respective interests, ownership of shares of stock in the corporation is but incidental to ownership of a water right, which is appurtenant to the land upon which the water is used. See *Ireton v. Idaho Irrigation Co.*, 30 Idaho 310, 317, 164 P. 687, 689. In *Kendrick v. Twin Lakes Reservoir Co.*, 58 Colo. 281, 144 P. 884, we had occasion to pass upon the status of the capital stock of one of the companies involved here. We said: "The corporation is purely a mutual reservoir company, in which the capital stock stands for and represents the consumer's interest in the reservoir, canal, and water rights."

The above opinion of the Supreme Court of Colorado merely follows a long list of earlier opinions holding that a mutual ditch company is merely an agent or trustee for the farmers, who are the real owners of the water rights, including the ditches and reservoirs. *Farmers Ind. Ditch Co. v. Agricultural Ditch Co.*, 22 Colo., 513, 45 P. 444; *Rocky Ford Canal, Etc., Co. v. Simpson*, 5 Colo. App. 30, 32, 36 P. 638; *Comstock v. Drainage Dist.*, 97 Colo. 416, 419, 50 P. (2d) 531; *Wyatt v. Larimer & Weld Irr. Co.*, 18 Colo. 298, 308, 33 P. 144; *Monte Vista Co. v. Centennial Co.*, 24 Colo. App. 496, 498, 135 P. 981; *Kendrick v. Twin Lakes Res. Co.*, 58 Colo. 281, 144 P. 884; *Farmers Highline Canal, etc., Co. v. Southworth*, 13 Colo. 411, 21 P. 1028.

The majority opinion of the Court of Appeals (R. 122) erroneously applies to the general concept and nature of a mutual ditch company, such as Petitioner, the principle announced by this Court in *National Labor Relations Board v. Hearst Publications*, 322 U. S. 444, that a federal statute is not expanded to include some employees and limited to exclude others engaged in the same work, depending upon



local statutory or judicial concepts. A mutual irrigation company, such as Petitioner, has its own nature and does not depend upon any more local or judicial concept. As a matter of judicial notice, the entire semi-arid western part of the United States raises its agricultural crops primarily through the means of irrigation. Furthermore, only a comparatively few acres of land are in such close proximity to the public streams that an individual farmer can get the water from the streams <sup>to</sup> his land. This has resulted in the farmer's grouping themselves together in the form of mutual irrigation or ditch companies so that by their common enterprise and through the agencies of mutual ditch companies they can construct and operate their ditches and their reservoirs and divert from the streams and apply to their land the water in the public streams which the various state constitutions granted by the federal government provides they shall have the right to divert and apply to irrigation for agricultural purposes.

That a mutual irrigation or ditch company is not a form of operation peculiarly local to Colorado and that such a mutual ditch company is merely a matter of convenience or agency of the farmers in the irrigation of their lands is stated by the leading legal textbooks on irrigation and water rights. Quoting from *Water Rights in the Western States*, Third Edition, Volume 2:

"Sec. 1266. Mutual Companies—Business, not Subject to Public Control. \* \* \* Mutual companies are usually such that shares of stock represent rights to specific quantities of water, and the stockholder's right to a supply rests upon his stock and not upon his status as a member of the public, the company being formed to supply water to its stockholders only. Such companies occupy a very great and extensive part of the Western irrigation field. \* \* \*

"Most of the irrigation in Southern California is done under mutual organization, in which each irrigator owns stock. The amount of stock held varies from a fraction of a share per acre to several shares per acre. Somewhat similar organizations are found in large numbers in other parts of California, par-

ticularly San Joaquin Valley (although there public service companies predominate). Co-operative organizations of one form or another are largely in majority in Utah, and some of the most important irrigation systems of Colorado are under similar organization.

Sec. 1267. Mutual Companies Continued.—In Colorado, as elsewhere set forth, the consumer from a company's ditch is held to be an appropriator from the natural stream through the intermediate agency of the ditch, with a result approaching public ownership. Where the water users are numerous there is little difference between mutual companies and general companies under this view. The consumer in Colorado has all the rights of an appropriator as though himself diverting the water from its natural source, and the canal company is only an agent to carry the water to him. This has been held true of mutual companies as of other kinds, so that a stockholder in a mutual company in Colorado may bring suit like other appropriators to change his point of diversion, without the consent of the company. It is held in Colorado that a stockholder in a mutual ditch company may change his place of use so long as other stockholders are not injured, and a by-law to the contrary is invalid where not authorized by charter or expressly assented to by the stockholder. A right represented by a certificate, it has been held, may be lost by non-use, like appropriations from a natural stream.

. . . . .

Sec. 1238. The Rule in the Desert States.—  
 \* \* \* The rule of the arid States is that (wholly irrespective of mutual companies in private service) the consumer from a ditch is, through the intermediate agency of the ditch, an appropriator from the natural stream from which the company's ditch heads, and a part owner in the natural resource and in the canal and distributing system. \* \* \*

To the same effect is *Long on Irrigation*, Section 126, Pages

258, 259, and *Kinney on Irrigation and Water Rights*, Second Edition, Chapter 75, Pages 2659, et seq.

The Idaho Supreme Court has well expressed the nature of a mutual ditch company in its recent opinion in *Big Wood Canal Co. v. Unemployment Comp. Division*, 61 Idaho 267, 100 P. (2d) 49, quoted from at some length in the dissenting opinion of Judge Phillips in this case (R. 135-136), from which quotation we extract the following:

... \* \* \* The fact, that the Big Wood Canal Co. employs and pays the men who tend and maintain the reservoirs and canals, and measure and deliver the water to the farmers, renders them no less laborers in the interest and field of agriculture, since the entire maintenance and operating expense is charged up to and prorated among the various farms and tracts of land to which the water is delivered as an appurtenance. \* \* \* The Big Wood Canal Co. is not a profit-making corporation; it is merely a medium or instrumentality created to represent the farmers owning water rights from the reservoirs and is doing for them what each one can not do alone for himself.' "

Again, as showing the majority opinion misconception of the nature of a mutual irrigation company, is the comment on *Kendrick v. Twin Lakes Res. Co.*, 58 Colo. 281, 144 P. 884, *Comstock v. Olney Springs Drainage Dist.*, 97 Colo. 416, 50 P. (2d) 531, and *Beatty v. Board of County Commissioners of Otero County*, 101 Colo. 346, 73 P. (2d) 982. On page 132 the majority opinion refers to these cases only as related to the imposition of special assessments or levying of ad valorem taxes. On the contrary, the important holding of these cases, which are in line with all of those above referred to, is that the farmer appropriator is the owner of the water right, which water right includes the ditches and the canals, and that the ditch company is merely the farmer appropriator's agent, organized as a matter of convenience, to secure his irrigation water. These cases show, what is apparent, that the water right is appurtenant to the land and the ditches and reservoirs are a part of the water right and are,

consequently, a part of or appurtenant to the land on which the irrigation actually takes place and the crops are raised.

We most earnestly but respectfully again insist that the majority opinion of the Court of Appeals in this case has misconceived the nature of the Petitioner as a mutual ditch company. While it is technically a corporate entity, it is not, as stated in the majority opinion, "separate and distinct from the farmers to whom it furnishes water for irrigation". Petitioner is not, as stated in the majority opinion, "a company engaged in diverting water storing water, and delivering water to farmers at their laterals for irrigating lands of the farmers, and in keeping the property of the company in operating condition, all separate and distinct from the farming operations of the farmers" (R. 133). It is true that the ditch riders and lake tenders do not do all of the work necessary to the raising of the crops by the farmer stockholders any more than does an employee who may attend to the horses, or do nothing more than plowing, or nothing more than cultivating, but he is engaged in an essential part of the farmer's activities in raising his agricultural crops. Petitioner is not an independently operated irrigation corporation. It is as stated in the dissenting opinion, "nothing more than a mutual agency organized for the convenience of the owners of land and appurtenant water rights". This necessarily follows from the facts stipulated in this case and found by the trial court and recognized by the decisions of the Supreme Court of Colorado and other states and the water right textbooks.

We submit that, as found by the trial court (R. 120), the Petitioner's employees are, in truth and in fact, through and by reason of the agency of Petitioner for its stockholders, for all intents and purposes, employees of the farmer stockholders of Petitioner. As stated by Judge Phillips in his dissenting opinion (R. 135) Petitioner's employees "are, in substance, the employees of the landowners."



## CONCLUSION

We submit that the Court of Appeals committed grievous error, after holding that Petitioner's employees are engaged in the production of goods for commerce, in further holding that they are not employed in agriculture.

If Petitioner's employees are engaged in the production of goods for commerce, as held by the Court of Appeals, then we submit this question, as did the learned trial judge in his "Memorandum on Final Hearing" (R. 105)—If Petitioner's employees are not engaged in agriculture, what are they engaged in?

The petition and this supporting brief considered, especially in view of the great public importance of the questions involved to the semi-arid western half of the United States where irrigation is the lifeblood of agriculture, it is respectfully submitted that certiorari should be granted in this case.

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## APPENDIX.

Sections of Fair Labor Standards Act of 1938 referred to in foregoing brief.

(References are to both the sections of the Act itself and to the same sections as appear in Title 29, U.S.C.A.).

*Finding and Declaration of Policy*

Title 29, U.S.C.A., Sec. 202

"Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

*Definitions*

Title 29, U.S.C.A., Sec. 203

"Sec. 3. As used in this Act—

. . . . .

"(d) 'Employer' includes any person acting di-

rectly or indirectly in the interest of an employer in relation to an employee but shall not include the United States or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

“(e) ‘Employee’ includes any individual employed by an employer.

“(f) ‘Agriculture’ includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

“(h) ‘Industry’ means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

“(i) ‘Goods’ means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

“(j) ‘Produced’ means produced, manufactured, mined, mined, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the

production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

### *Maximum Hours*

Title 29, U.S.C.A., Sec. 207.

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

### *Exemptions*

Title 29, U.S.C.A., Sec. 213

"Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); or (b) any employee employed in agriculture;

### *Prohibited Acts*

Title 29, U.S.C.A., Sec. 215

"Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—



"(2) to violate any of the provisions of section 6 or section 7 or any of the provisions of any regulation or order of the Administrator issued under section 14;

*Injunction Proceedings*

Title 29, U.S.C.A., Sec. 217

"Sec. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U.S.C., 1934 edition, title 28, sec. 384), to restrain violations of section 15."

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**REPLY** BRIEF OF APPELLANTS

IN THE  
**SUPREME COURT OF THE  
UNITED STATES**

October Term, 1948.

No. 128.

**THE FARMERS RESERVOIR AND IRRIGATION  
COMPANY, a Corporation, PETITIONER,**

vs.

**WILLIAM R. McCOMB, Administrator of the Wage and  
Hour Division of the United States Department of  
Labor, RESPONDENT.**

**REPLY BRIEF OF THE FARMERS RESERVOIR AND IRRIGATION  
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**REPLY BRIEF OF APPELLANTS**

The Brief filed on behalf of the Respondent indicates a complete misunderstanding of the true nature of the Petitioner and the activities in which it is engaged and evidences a refusal to recognize a fact, the existence of which is a matter of judicial notice in our Western courts, namely, that in the arid states of the West irrigation is the very backbone of the agricultural industry and is "per se agriculture."



## ARGUMENT

## I

## RESPONDENT MISCONCEIVES THE "QUESTION PRESENTED."

The "question presented" is set forth by Petitioner on Page 7 of its Petition for writ of certiorari, and by Respondent on Page 2 of his Brief. The only similarity between the two statements is in the headings. Petitioner embodies all of the facts in its presentation of the question, whereas, Respondent glanced only at the surface of the problem and bases his presentation upon the fact that Petitioner is a corporate entity and does not, as such corporate entity, own any farms.

Respondent's argument (pages, 8-16 of his Brief) is divided into three major subdivisions, which we answer in order as follows:

1. Respondent argues that the agricultural exemption Section 13 (a)(6) of the Act must be narrowly construed to conform to the decision of this Court in *Phillips Co. v. Walling*, 324 U. S. 490, 493. We agree entirely with the rule announced in the Phillips Company case, but when we do so, we take into consideration the qualification that this Court attached to the general rule applicable to an exemption claimed when the Court said:

"An exemption from such humanitarian and remedial legislation, must, therefore, be narrowly construed giving due regard to the plain meaning of statutory language and the intent of Congress." (Emphasis ours)

Petitioner's complaint of the argument of Respondent in his Brief and of the majority opinion below is that neither Respondent nor the Court gave due regard or any regard to the plain meaning of the statutory language defining "agriculture" nor to the intent of Congress as plainly expressed in the Act, and as interpreted by the Administrator in his Interpretative Bulletin No. 14 (Exhibit 5-R-59-82) which deals with the subject of "agriculture."

In *U. S. v. Turpentine Co., et al.*, -111 Fed. (2d) 400,

(404-405) the Fifth Circuit discussed the term "agricultural labor" as it is used in the Social Security Act and said;

" \* \* \* It is now a settled principle of statutory construction that Congress, or a legislature in legislating with regard to an industry or activity, must be regarded as having had in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity. When then, Congress in passing an act like the Social Security Act, uses, in laying down a broad general policy of exclusion, a term of as general import as 'agricultural labor'; it must be considered that it used the term in a sense and intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections of the United States where the act operates. This does not mean of course, that a mere local custom which is in the face of the meaning of a general term used in an act, may be read into the act to vary its term. It does mean however, that when a word or term intended to have general application in an activity as broad as agriculture, has a wide meaning, it must be interpreted broadly enough, to embrace in it all the kinds and forms of agriculture practiced where it operates, that its generality reasonably extends to. \* \* \* "

It is our firm contention, that the rule as to narrow construction is not to be applied in such manner as would eliminate from the definition of "agriculture" that activity which has been accepted throughout the entire West for more than 100 years, as "per se agriculture", namely, irrigation of farm lands.

Respondent's second argument (page 12 of his Brief) is that the decision below is in accord with the decision of the First Circuit in *McComb v. Super-A Fertilizer Works*, 165 Fed. (2d) 824, and with the decision of the Eighth Circuit in *Meeker Cooperative Light & Power Assn. v. Phillips*, 158 Fed. (2d) 698, where a contention identical with Petitioner's was explicitly rejected.

It is Petitioner's contention that these two cases cited by Respondent do not reject Petitioner's contention, and that they are irrelevant to the claim of exemption made by Petitioner herein.

As we have previously stated, the McComb case, *supra*, is a consideration of the legislative history of the word "production" in the Act, and all the Court said in the McComb case is:

"It seems clear to us that 'production' in Section 3(f) referred only to *agricultural* production (emphasis ours), and that it was not the intent of Congress to exempt *industrial* (emphasis ours) activity necessary to the production of agricultural goods which go into commerce."

Petitioner's contention is that the decision in the McComb case, *supra*, supports Petitioner's contention rather than Respondent's, for it clearly distinguishes between what is a *commercial* activity and what is an *agricultural* activity. The Court held that the mixing and bagging and loading of a truck with fertilizer was a *commercial* activity and not an *agricultural* activity, and that consequently the employees in question were held to be engaged in a commercial activity and not an agricultural activity, and consequently were not entitled to an agricultural exemption. In the case at bar, Petitioner's employees are not engaged in any commercial activity. The Stipulation of Facts, the Findings of the trial Court and the decision of the Court below all say, as the Court below says in its majority opinion—

"The employees in question perform physical work which is indispensable to the irrigation of the land. Without their work, the land cannot be irrigated. The agricultural commodities cannot be produced, and therefore no finished products can move into interstate commerce."

3. Respondent's third argument (page 14 of his Brief) becomes applicable only if the Court rejects Petitioner's main contention that *irrigation by a mutual ditch company such as Petitioner is "per se agriculture"*. If this Court rejects Petitioner's main contention then it is our position

that Petitioner (and therefore its employees) is engaged in agriculture because the activity in which the Petitioner is engaged is a practice performed by a farmer (or his employees) as incident to or in conjunction with farming operations.

2 There is nothing in the Stipulation of Facts (R. 11-25) in the Trial Court's Findings of Facts (R.106-121) nor in the majority opinion below (R.127-134) that shows that Petitioner did not assert at all stages of this case, that Petitioner's employees are, in substance and in fact, employees of the farmer-stockholders employed through the agency of Petitioner for its farmer-stockholders. The dissenting opinion (R.134-137) contains a very clear statement of Petitioner's position in this regard as follows:

"Its employees are in substance the employees of the landowners. Their compensation is paid from assessments paid by the landowners. The farmers' company makes no profit. It owns the beneficial title to no property. It is nothing more than a mutual agency organized for the convenience of the owners of land and appurtenant water rights. It is in no sense an independently operated irrigation company."

#### THE STIPULATION AND AGREEMENT AS TO CERTAIN FACTS

(R. 11-25) in part provides:

"3. Defendant (Petitioner here) is a non-profit corporation and is a mutual ditch company, organized and existing under particular statutes of the State of Colorado \* \* \*"

"11. Defendant does not sell water to any one and does not carry water for hire."

"14. The Defendant as a mutual ditch company, has not (made) and can not make a profit, and has not paid and can not pay any dividends."

We firmly believe that under the agreed facts it clearly appears that Petitioner was created and exists for one purpose only and that is on behalf of the farmer-stockholders



of Petitioner to employ and keep at work ditch walkers and reservoir attendants, who will conduct the water belonging to the individual farmer-stockholders from the streams to the reservoirs and from the reservoirs to the lands of the farmer-stockholders, and to maintain, clean and repair the ditches and the reservoirs in order that the indispensable irrigation water may be delivered to the individual farmer-stockholders who own the right to use said water and make beneficial application thereof on their individual lands so that agricultural crops can be raised. Briefly, Petitioner, a corporate entity, is only an absolutely necessary convenience whereby many farmer-stockholders by combining together can do what each requires and needs to raise agricultural crops; a requirement and a need which no one farmer acting alone can supply or furnish. If each farmer-stockholder did the work that is done by the employees of the Petitioner (a single agency for a group of farmers) there would be no question but what his work would be considered "agriculture". The fact that he combined with other farmer-stockholders (an established practice vital and necessary) does not make it any less "agriculture."

## II

### THE CARRIAGE AND DELIVERY OF WATER FROM A PUBLIC STREAM TO FARM LANDS BY A MUTUAL DITCH COMPANY IS "AGRICULTURE."

We realize that in this portion of this Brief, we may be guilty of repetition, but our feeling, in this regard, is best described by a remark attributed to the late Mr. Justice Holmes of this Court, when the Justice stated: "Our task is not to elucidate the obscure but to emphasize the obvious."

To the people of the entire West it is obvious that irrigation by a mutual ditch company is "per se agriculture." We are not here concerned with a matter that is purely local to Colorado or any particular portion of said State, but our problem is one that affects an area that constitutes more than one-third of the entire Nation.

This Court in the case of *State of Wyoming v. State of Colorado, et al.*, 259 U. S. 496, 66 L. Ed. 999, 1019, speaking of irrigation in the arid states of Wyoming and Colorado, said:

"The lands in both states are naturally arid, and the need for irrigation is the same in one as in the other. The lands were settled under the same public land laws, and their settlement was induced largely by the prevailing right to divert and use water for irrigation, without which the lands were of little value. Many of the lands were acquired under the Desert Land Act, which made reclamation by irrigation a condition to the acquisition. The first settlers located along the streams where water could be diverted and applied at small cost; Others with more means followed and reclaimed lands farther away. Then companies with large capital constructed extensive canals and occasional tunnels whereby water was carried to lands remote from the stream and supplied, for hire, to settlers who were not prepared to engage in such large undertakings. Ultimately, the demand for water being in excess of the dependable flow of the streams during the irrigation season, reservoirs were constructed wherein water was impounded when not needed and released when needed, thereby measurably equalizing the natural flow. Such was the course of irrigation development in both states. It began in territorial days, continued without change after statehood, and was the basis for the large respect always shown for water rights. These constituted the foundation of all rural home building and agricultural development, and, if they were rejected now, the lands would return to their naturally arid condition, the efforts of the settlers and the expenditures of others would go for naught, and values mounting into large figures, would be lost."

Again in the case of *State of Nebraska v. State of Wyoming*; 325 U. S. 589, 89 L. Ed. 1815, 1819, this Court said: "

..... The river basin in Colorado and Wyoming is arid, irrigation being generally indispensable to agriculture. Western Nebraska is partly arid and partly semi-arid. Irrigation is indispensable to the kind of agriculture established there. ....

The majority opinion of the Court of Appeals (R. 130-131) recognizes that irrigation, such as we are here involved with, is indispensable to agriculture as evidenced by the following paragraph thereof:

"Here, agricultural commodities are produced on land irrigated with water furnished by the irrigation company. The agricultural commodities are processed and the finished products move in the channels of interstate commerce. Irrigation of the land is necessary in order to produce the agricultural commodities. The employees in question perform physical work which is indispensable to the irrigation of the land. Without their work, the land cannot be irrigated, the agricultural commodities cannot be produced, and therefore no finished products can move in interstate commerce. The relationship of the employees to the production of the finished products which move in interstate commerce is not objectionably remote or tenuous. Instead, their work is vital and essential to the integrated effort which brings about the movement of the finished products in commerce. It is manifestly clear that the employees are engaged in a process or occupation necessary to the production of goods for commerce, within the meaning of the Act. *Reynolds v. Salt River Water Users Ass'n.*, 143 F. (2d) 863, certiorari denied, 323 U. S. 764; *Walling v. Friend*, 156 F. (2d) 429; *Meeker Cooperative Light and Power Ass'n. v. Phillips*, 158 F. (2d) 698; *McComb v. Super-A Fertilizer Works*, 165 F. (2d) 824."

The Respondent by Interpretative Bulletin No. 14, (R. 59-80) discusses at length the definition of "agriculture" as contained in the Act and in Paragraph 3, (R. 63) states:

"3. The term 'cultivation and tillage of the soil' includes all the operations necessary to prepare a

suitable seedbed, eliminate competing weed growth and improve the physical condition of the soil."

and in Paragraph 51(a) (R. 63) Respondent interprets a portion of the definition of "agriculture" as follows:

"5.(a). The term 'production, cultivation growing \* \* \* of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended)' includes all customary operations in connection with raising any 'agricultural or horticultural commodities.' \* \* \*

The majority opinion of the Court of Appeals (R.131) and the statements made in the Brief of Respondent, which are contrary to Respondent's own interpretation of the definition of "agriculture" as contained in the Act indicates a grammatical construction of the definition of "agriculture", which is contrary to the expressed intent of Congress, as appears from the Congressional Record (Vol. 83, page 9162) when Senator Thomas from Utah and Senator Johnson of California, in discussing the "agriculture" definition in the Act, made the following statements:

"Mr. Johnson of California: "I said that, in general language, agriculture is exempted from the operation of the bill."

"Mr. Thomas of Utah: "It is."

"Mr. Johnson of California: "Does the Senator know of any particular kind of agriculture that is included in the bill?"

"Mr. Thomas of Utah: "I do not know of any. The definition seems to be all-inclusive, and we tried to make it so.""

In the case of *Damutz v. Pinchbeck*, 158 F. (2d) 883 the Second Circuit, discussed the term "agriculture" as used in the Act, and in the decision at page 883 it is said:

"Although this exemption provision in a remedial statute should be construed strictly, it should, of course be given due effect. It is drawn in far reach-



ing language which shows the intent of Congress to make the term "agriculture" cover much more than what might be called ordinary farming activity and that is what new controls. Differing definitions of "agriculture" in other statutes but indicate different Congressional methods in dealing with other matters and cannot serve to narrow the scope of this one."

As we read the Act, and particularly the definition of "agriculture", it is our firm conviction that agriculture as an industry is what Congress was referring to and that the exemption, "any employee employed in agriculture; \* \* \*", Title 29, U. S. C. A. Sec. 213, was intended to cover and include any and all employees engaged in the agricultural industry, and not only such employees as may be employed by a farmer to perform work on a farm.

It is our firm conviction that irrigation by a mutual ditch company, such as Petitioner, in the arid states of the West, is agriculture. Respondent on page 14, of his Brief refers to several decisions involving farmers' non-profit cooperatives, in which it was held, that employees of such cooperatives were not exempt from the Act as, "employees engaged in agriculture." In *Lake Region Packing Ass'n v. United States*, 146 F. (2d) 157, the Fifth Circuit in speaking of a farmers cooperative said:

"\* \* \* For it is quite clear that here, is a case not of packing, processing and marketing as incidental to ordinary farming operations, but one, the essence of which was a commercial operation. Because this is so, those acts, which were not performed in the field or in connection with getting the product from the field to the place of processing and were therefore not per se agricultural, are deprived of their agricultural character by the dominance in the operation of their commercial character. \* \* \*" (Emphasis ours.)

We believe that the above quoted language clearly demonstrates that none of the decisions involving farmers cooperatives tends to support the position of the Respondent in our particular case. We make this statement because

it is our position and we believe the position of this Court as evidenced by its many Opinions involving water rights in the Western States, that irrigation such as the type that is performed by Petitioner is "per se agriculture."

### CONCLUSION

Respondent has in his Brief asserted that the problem here involved is one, the answer to which is sought by Petitioner upon local statutory or judicial concepts. With this assertion we disagree, because the statutory or judicial concepts relied on by Petitioner are common to the entire West and, further, the judicial concepts are those that have long been accepted not only by the entire western judiciary but also by this Court as evidenced by its opinions, portions of which are quoted above. Colorado is but one of the many States that finds its main industry affected by the majority opinion below and Petitioner is but one of hundreds affected, all of whom are engaged in the irrigation of farm lands, which has stimulated, fostered and made the agricultural industry the great business that it is.

The Trial Court emphasized the obvious in stating that Petitioner and its employees were engaged in "agriculture" as that term is defined in the Act and the majority opinion of the Circuit Court of Appeals also emphasized the obvious when it stated:

"Irrigation of the land is necessary in order to produce the agricultural commodities. The employees in question perform physical work which is indispensable to the irrigation of the land. Without their work, the land cannot be irrigated, the agricultural commodities cannot be produced, and therefore no finished products can move in interstate commerce."

The Trial Court and the author of the dissenting opinion in the Circuit Court followed the obvious to its logical conclusion but not so the majority in the Circuit Court, who concluded that the obvious becomes obscure when a corporate entity entered the picture.

We earnestly urge this Court to take jurisdiction because of the great public importance of the questions of

federal law which the Court of Appeals has decided, none of which has been, but all of which Petitioner submits should be settled by this Court.

A "Conditional Cross-Petition For A Writ Of Certiorari" has been filed in this cause by Respondent to which Petitioner has not filed a Brief in opposition, for it is important to Petitioner and hundreds of other mutual ditch companies that this Court settle the status of necessary office or clerical help as well as the status of ditch riders, headgate men and reservoir or lake tenders.

Respectfully submitted,

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**BRIEF OF THE FARMERS RESERVOIR  
AND IRRIGATION COMPANY**

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IN THE  
**SUPREME COURT OF THE  
UNITED STATES**

OCTOBER TERM 1948

128

Nos. 128 and 196.

196

THE FARMERS RESERVOIR AND IRRIGATION COM-  
PANY, a Corporation, PETITIONER,

v.

WILLIAM R. McCOMB, Administrator of the Wage and  
Hour Division of the United States Department of Labor,  
RESPONDENT.

WILLIAM R. McCOMB, Administrator of the Wage and  
Hour Division of the United States Department of Labor,  
PETITIONER,

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IN THE  
**SUPREME COURT OF THE  
UNITED STATES**

**OCTOBER TERM 1948**

Nos. 128 and 196.

**THE FARMERS RESERVOIR AND IRRIGATION COM-  
PANY, a Corporation, PETITIONER,**

v.

**WILLIAM R. McCOMB, Administrator of the Wage and  
Hour Division of the United States Department of Labor,  
RESPONDENT.**

**WILLIAM R. McCOMB, Administrator of the Wage and  
Hour Division of the United States Department of Labor,  
PETITIONER,**

v.

**THE FARMERS RESERVOIR AND IRRIGATION COM-  
PANY, a Corporation, RESPONDENT.**

**BRIEF OF THE FARMERS RESERVOIR  
AND IRRIGATION COMPANY**

By agreement between counsel the questions presented in both of the above causes will be covered in this Brief.

**THE FARMERS RESERVOIR AND IRRIGATION COMPANY** will be designated as "PETITIONER" throughout this Brief notwithstanding that it is "RESPONDENT" in Cause No. 196, and **WILLIAM R. McCOMB**, Petitioner in Cause No. 196, will be referred to throughout this Brief as "ADMINISTRATOR".



## **OPINIONS BELOW**

The judgment of the District Court in favor of Petitioner was reversed by the Court of Appeals pursuant to the majority opinion of Judges Bratton and Murrah (R. 127), with Judge Phillips dissenting (R. 134). The majority and dissenting opinions of the Court of Appeals (R. 127-137) are reported in 167 Fed. (2d) p. 941. The opinion of the District Court appears in the record at page 99, et seq., and the Findings of Fact, Conclusions of Law and Decree of the District Court appear in the record at pages 99-122.

## **JURISDICTION**

The judgment of the Court of Appeals was entered April 23, 1948, with petition for rehearing (filed by the Administrator) denied May 25, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. Certiorari was granted October 11, 1948.

## **STATUTE INVOLVED**

The statute involved is the Fair Labor Standards Act of 1938 (52 Stat. 1060, et seq., Title 29, U. S. C. A., Sec. 201, et seq.) (hereinafter referred to as the Act). The pertinent provisions of the Act are set forth in the Appendix, infra, pp. a, b, c and d.

## **CONCISE STATEMENT OF THE CASE**

The Administrator of the Wage and Hour Division of the Department of Labor filed a complaint in the District Court against the Petitioner charging the Petitioner with violating the Act by failing to pay certain of its employees time and one-half for statutory overtime and by failing to keep records as required by the Act. An injunction was sought restraining continued violation. The Petitioner denied coverage under the Act. The District Court held that all the employees of the Petitioner involved, except one, were engaged in commerce or in the production of goods for commerce and that all of such employees were engaged in agriculture and, therefore, exempt under Subdivision (6) of Section 13 of the Act. The District Court, therefore, dismissed

the action and the Administrator appealed. The Court of Appeals, one Judge dissenting, reversed the District Court and held that the Petitioner's employees are engaged in the production of goods for commerce and are not within the agricultural exemption of the Act.

The case was submitted on agreed stipulation of facts (P. 11-83). Briefly summarized, the facts are as follows:

A number of years back the owners of certain dry, grazing or unproductive lands in several counties north and west of Denver, Colorado, wishing to convert their lands into irrigated farm lands, planned and conceived the construction of an irrigation system, by means of which water would be diverted from the public streams in Colorado and impounded in and carried through the reservoirs and ditches of the irrigation system and distributed therefrom for the irrigation of this land. Accordingly, the Petitioner was organized and incorporated under the laws of the State of Colorado as a *mutual ditch company* by the owners of this land and the irrigation system was constructed, consisting primarily of four large storage reservoirs, a number of small reservoirs and from 300 to 400 miles of irrigation ditches or canals, all located in Colorado, through which approximately 100,000 acres of land are irrigated, in whole or in part, with water diverted from the public streams and impounded in and carried through the reservoirs and ditches of the system. The record title to the land upon which the reservoirs and canals are located stands in the name of Petitioner.

Acting under the Constitution and Statutes of the State of Colorado, "appropriations" of water had been made from the public streams which give the right to the appropriators of such water to divert the same from the public streams in order of time or priority as determined by "adjudication decrees" entered by courts of the State of Colorado. These decrees permit this water to be diverted from the public streams and used for irrigation purposes only.

As stated above, Petitioner is a mutual ditch company. It has 10,500 shares of authorized capital stock. Each share entitles the owner thereof to an equal and pro rata share

with every other share of the available supply of water in the division of the system to which such water is allocated. Each year the stockholders (who are the owners of the land who organized Petitioner to secure their irrigation water or their successors in interest) make an annual assessment upon the outstanding stock for the purpose of raising money necessary to defray the expenses incident to the maintenance and operation of the system and for the payment of the principal and interest on the outstanding bonds of the company, which bonds were issued in connection with the construction of the system or the acquisition of water rights. The proceeds of the assessments constitute the sole source of income of the company, with the exception of incidental income from rents for duck hunting and similar purposes on some of the reservoirs, the receipts of which operate to reduce the amount of the annual assessments. Payment of the assessments is a condition precedent to the right of a stockholder to receive water allocated to his stock. The company does not sell water and does not carry water for hire. It does not and cannot make a profit and it does not pay dividends. It is purely a mutual ditch company organized and existing under particular statutes of the state of Colorado relating to such corporations, for the sole purpose of owning, maintaining and operating a system of irrigation canals and reservoirs for the purpose of diverting water from the public streams of Colorado and transporting such water through said canals and impounding same in said reservoirs and distributing same from said canals and reservoirs to its individual stockholders or their nominees, for the irrigation of the farm lands under its irrigation system. Its stock is the evidence of ownership or the muniment of title showing the ownership of the water right and canals and reservoirs by the stockholder.

Irrigation is essential to the proper raising of crops on the lands of Petitioner's stockholders. Petitioner employs reservoir tenders, ditch riders and operator of a dragline used in connection with the maintenance and repair of the reservoirs and canals and from time to time common laborers for special maintenance work. The number of such employees ranges from 16 to approximately 26. The reservoir tenders and ditch riders, collectively and interchangeably, tend to the

diverting of the water from the streams, to its storage and to its conduct through the canals and into the laterals of the farmers which extend from the farms to the canals of the system. They patrol the reservoirs, canals and other appurtenant structures and keep the property in good operating order. The work of the employees is essential to the irrigation of the lands of the farmer stockholders of Petitioner.

In numerous work weeks in the year some of these employees work in excess of 40 hours and are not paid for the overtime at the rate of one and one-half times their regular pay.

The water secured by the farmer stockholders of Petitioner through this system is used for irrigation purposes on the stockholders' farm lands in connection with the tillage of the soil and the production, cultivation, growing and harvesting of a wide variety of agricultural crops. These farm lands are highly productive and such high degree of productivity results in a substantial degree from the irrigation thereof by the use of this water by the individual farmers under the usual practices of all farmers producing agricultural crops under this irrigation system. This irrigation water is necessary for these agricultural purposes, and if this water were not available and used on the land of Petitioner's stockholders this land would cease to be irrigated farm land and would become non-irrigated, grazing or other class of land.

The complaint filed by the Administrator (R. 4) expressly alleges that *Petitioner's employees* are engaged "in processes and occupations, necessary to the production of corn, winter wheat, spring wheat, oats, barley, potatoes, beans, sugar beets, rye, and other commodities" and that the water secured through Petitioner's system "is used and utilized . . . in the irrigation and production of corn . . . and other commodities . . .". These facts were likewise stipulated (R. 17, et seq).

The Stipulation of Facts in part provides:

"15. The farm lands irrigated by water so distributed by defendant through its irrigation system are highly productive, and such high degree of pro-



ductivity results in a substantial degree from the irrigation thereof by the use of such waters by the individual farmers under the usual practices of all the farmers producing agricultural crops under defendant's irrigation system. On these irrigated farm lands there are planted, grown and produced in large quantities a wide variety of agricultural crops, such as sugar beets, wheat, corn and other grains, potatoes, peas, beans and other crops; and such irrigation water is necessary to and is used for the growth and production of such crops. If such irrigation water were not available and used on such land, it would cease to be irrigated farm land; and it would become non-irrigated farm land, grazing land or other class of land.

"16. The water collected, run and delivered by the defendant through the labor of certain of its employees to the individual farmers under the defendant's irrigation system, in manner as elsewhere explained in this stipulation is used by the individual farmers on their farm lands for irrigation purposes in connection with the tillage of the soil and the production, cultivation, growing and harvesting of the aforementioned agricultural crops. The distribution and delivery of such water by the defendant to the individual farmers into the farmer's individual lateral has been and is being made substantially in the manner provided for in defendant's By-Laws. The defendant has exercised control over the diversion headgates or weirs on or along its canals, through which diversion headgates or weirs water is diverted to the individual farmers for their use in irrigation substantially in the manner as specified in the By-Law." (R. 17-18)

It is further provided in the Stipulation that reservoir tenders perform maintenance work upon the Petitioner's storage reservoirs and also operate the intakes and outlets of such reservoirs and during the irrigation season release from storage such water as is available to fill the current requirements of the farmer-stockholders who are entitled to the water (R. 19) and that Petitioner's ditch riders during the irrigation season receive orders and demands for water

from the farmers along particular sections of the canal and then set headgates or weirs on Petitioner's canal so as to divert the water called for into the farmers' individual laterals and, further, both reservoir tenders and ditch riders, collectively and interchangeably, keep the canals of Petitioner free from weeds, rubbish and sand and in good repair for the free and uninterrupted flow of water therethrough and keep the reservoirs, diversion headgates and weirs in good repair and operating order, and conduct and run the water through and out of Petitioner's canals and reservoirs and through diversion headgates and weirs into the farmers' individual laterals (R. 20).

Neither Petitioner, nor any of its stockholders sell or distribute any agricultural product in interstate commerce. However, in raising these agricultural products, the stockholders do know that a substantial part of them sold locally to purchasers in Colorado, such as sugar beets, corn, beans, etc., will be processed in Colorado by the purchasers and the processed products, in substantial amounts, will be shipped outside the State of Colorado in interstate commerce, and in some instances the farmer stockholders of Petitioner know that certain of their crops sold to local purchasers will thereafter, by such purchasers, without processing, be shipped interstate:

Under the laws of the State of Colorado and practices arising thereunder, taxes are not separately levied upon the irrigation system of a mutual ditch company, such as Petitioner, or the water or water rights connected therewith, but such irrigation system and water rights are deemed a part of the lands irrigated through the system and such lands are valued for tax purposes as irrigated land and the value of the water rights merged into the value of the irrigated lands.

As to Coler, the bookkeeper-accountant (Cause No. 196), it was stipulated that he had charge of and kept the Company books, including receipts and disbursement ledgers, bank and financial account ledgers for the activities of the Company; that he examined and checked the daily diary for work reports from each ditch rider or lake tender, for each day, and apportioned the total time shown by the monthly time and work sheets among the different accounts against

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which the work was charged; that in the absence of the secretary, the bookkeeper-accountant has charge of and keeps the records showing the assessments paid by the stockholders of the Company, and the records relating to the delivery of water, and that the records and reports required by State and Federal law were and are prepared by him; that the work performed by the bookkeeper-accountant is necessary in the conduct of Petitioner's business and to the proper keeping of the Petitioner's records and accounts (R. 22-23).

The District Court found that the Petitioner is merely the agent of its stockholders and that the employees of Petitioner have been and are, in truth and in fact, through and by reason of this agency, for all intents and purposes, employees of the former stockholders of Petitioner and are in practices and occupations necessary to the production of agricultural and horticultural crops and commodities (R. 119).

The District Court found that all of Petitioner's employees involved, with the exception of the bookkeeper-accountant, were engaged in the production of goods for commerce within the meaning of the Act, but further found that all of said employees were "employed in agriculture" as defined in the Act, and therefore, exempt from its coverage. Upon these findings the complaint of the Administrator was dismissed.

The Court of Appeals held that the said employees of Petitioner are engaged in the production of goods (agricultural) for commerce within the meaning of the Act, but by a two to one opinion reversed the District Court and held that said employees are not employed in "agriculture" as defined in the Act and further held that the question of the status of the bookkeeper-accountant of the Company, whose salary subsequent to the time of trial had been increased to more than two hundred dollars per month, was and is now moot so far as the granting of injunctive relief was and is concerned.

This issue as to the bookkeeper-accountant is the subject matter of Cause No. 196, and, while this issue as to the bookkeeper-accountant has been injected into this Cause in a very technical and limited way, we will contend in this Brief that

such employee (office help) should be treated not only in the same manner as all other employees, that is, as an employee employed in "agriculture" but also as an employee not engaged "in the production of goods for commerce."

**SPECIFICATION OF ASSIGNED ERROR**

**(Cause No. 128)**

*Petitioner assigns as error the findings and the judgment of the Circuit Court of Appeals that Petitioner's employees are not employed in "agriculture" as that term is defined in Section 3(f) of the Fair Labor Standards Act of 1938, and are therefore, not employees included within the exemption provided by the provisions of Section 13 (a) (6) of said Act. A more detailed statement as to Petitioner's contention is set out in "Questions Presented" below.*

**QUESTION PRESENTED (Cause No. 128)**

WHEN, BY COMMON KNOWLEDGE AND JUDICIAL NOTICE, IRRIGATION, THROUGH THE DIVERSION OF WATER FROM THE PUBLIC STREAMS AND THE APPLICATION THEREOF TO LAND, IS NECESSARY FOR THE PROPER RAISING OF AGRICULTURAL CROPS THROUGHOUT ALL THE SEMI-ARID STATES IN THE WESTERN PART OF THE UNITED STATES, INCLUDING COLORADO AND INCLUDING LANDS OF PETITIONER'S FARMER STOCKHOLDERS, WHICH FACT IN THIS PARTICULAR CASE IS CONCLUSIVELY ESTABLISHED BY THE ADMINISTRATOR'S COMPLAINT, THE STIPULATED FACTS, THE FINDINGS OF THE TRIAL COURT AND THE OPINION OF THE COURT OF APPEALS, ARE MEN EMPLOYED BY MUTUAL DITCH COMPANIES, SUCH AS PETITIONER, WHICH ARE ORGANIZED BY THE FARMERS, AS A MATTER OF CONVENIENCE, FOR THE PURPOSE OF SECURING SUCH IRRIGATION WATER, AND WHOSE WORK CONSISTS EXCLUSIVELY OF THE DIVERSION OF WATER OWNED BY THE FARMERS FROM THE PUBLIC STREAMS AND THE MAINTENANCE AND OPERATION OF THE IRRIGATION DITCHES



AND RESERVOIRS AND THE TRANSPORTATION OF THE WATER THERE THROUGH AND THE DELIVERY THEREOF FOR THE RAISING OF AGRICULTURAL CROPS, EMPLOYED IN "AGRICULTURE" AS THAT TERM IS DEFINED IN THE FAIR LABOR STANDARDS ACT OF 1938?

**QUESTION PRESENTED (Cause No. 196)**

WHETHER COLER, PETITIONER'S BOOKKEEPER-ACCOUNTANT, WHOSE WORK IS NECESSARY IN THE CONDUCT OF PETITIONER'S BUSINESS AND TO THE PROPER KEEPING OF PETITIONER'S RECORDS AND ACCOUNTS PERTAINING TO THE ACTIVITIES OF THE PETITIONER AND ALL OF ITS EMPLOYEES IS AN EMPLOYEE EMPLOYED IN "AGRICULTURE" AS THAT TERM IS DEFINED IN THE FAIR LABOR STANDARDS ACT OF 1938, AND IF NOT AN EMPLOYEE EMPLOYED IN "AGRICULTURE", THEN IS COLER, BOOKKEEPER-ACCOUNTANT, AN EMPLOYEE WHO IS NOT ENGAGED "IN THE PRODUCTION OF GOODS FOR COMMERCE"?

The Administrator in his Conditional Cross-Petition for a Writ of Certiorari which was granted on October 11, 1948, certified three very technical questions as to Coler, bookkeeper-accountant, a determination of which would not afford a final and complete answer to the major issue involved in both of these causes, namely: Are all employees, irrespective of whether they are office or field workers of a mutual ditch company as described above, engaged in "agriculture."

We respectfully ask the indulgence of this Court for a determination of the major issue involved in Cause No. 196.

**ARGUMENT**

Petitioner's employees are employed in "agriculture" and are, therefore, exempt from the provisions of the Act under Section 13 (a) (6) thereof

We will summarize our argument under indicative sub-headings.

## I.

Courts will take judicial notice of the fact that in the semi-arid regions of the United States (which includes Colorado) agricultural crops are not and cannot be raised without irrigation (supplying land with water by canals, ditches and reservoirs)

To the people of the entire West it is obvious that irrigation by a mutual ditch company is "per se agriculture." We are not here concerned with a matter that is purely local to Colorado or any particular portion of said State, but our problem is one that affects an area that constitutes more than one-third of the entire Nation.

This Court in the case of *State of Wyoming v. State of Colorado et al.*, 259 U. S. 496, 66 L. Ed. 999, 1019, speaking of irrigation in the arid states of Wyoming and Colorado, said:

"The lands in both states are naturally arid, and the need for irrigation is the same in one as in the other. The lands were settled under the same public land laws, and their settlement was induced largely by the prevailing right to divert and use water for irrigation, without which the lands were of little value. Many of the lands were acquired under the Desert Land Act, which made reclamation by irrigation a condition to the acquisition. The first settlers located along the streams where water could be diverted and applied at small cost. Others with more means followed and reclaimed lands farther away. Then companies with large capital constructed extensive canals and occasional tunnels whereby water was carried to lands remote from the stream and supplied, for hire, to settlers who were not prepared to engage in such large undertakings. Ultimately, the demand for water being in excess of the dependable flow of the streams during the irrigation season, reservoirs were constructed wherein water was impounded when not needed and released when needed, thereby measurably equalizing the natural flow. Such was the course of irrigation development in both states. It began in territorial days, continued without change after statehood, and was the basis for the large respect always shown for water

rights. These constituted the foundation of all rural home building and agricultural development, and, if they were rejected now, the lands would return to their naturally arid condition, the efforts of the settlers and the expenditures of others would go for naught, and values mounting into large figures would be lost."

Again in the case of *State of Nebraska v. State of Wyoming*, 325 U. S. 589, 89 L. Ed. 1815, 1819, this Court said:

"\* \* \* The river basin in Colorado and Wyoming is arid, irrigation being generally indispensable to agriculture. Western Nebraska is partly arid and partly semi-arid. Irrigation is indispensable to the kind of agriculture established there. \* \* \*"

The majority opinion of the Court of Appeals (R. 130-131) recognized that irrigation, such as we are here involved with, is indispensable to agriculture as evidenced by the following paragraph thereof:

"Here, agricultural commodities are produced on land irrigated with water furnished by the irrigation company. The agricultural commodities are processed and the finished products move in the channels of interstate commerce. Irrigation of the land is necessary in order to produce the agricultural commodities. The employees in question perform physical work which is indispensable to the irrigation of the land, without their work, the land cannot be irrigated, the agricultural commodities cannot be produced, and therefore no finished products can move in interstate commerce. The relationship of the employees to the production of the finished products which move in interstate commerce is not objectionably remote or tenuous. Instead, their work is vital and essential to the integrated effort which brings about the movement of the finished products in commerce. It is manifestly clear that the employees are engaged in a process or occupation necessary to the production of goods for commerce, within the meaning of the Act. *Reynolds v. Salt River Water Users Ass'n.*, 143 F. (2d) 863, certiorari denied, 323 U. S. 764; *Walling v. Friend*, 156 F. (2d) 429;

Meeker Cooperative Light and Power Ass'n v. Phillips, 158 F. (2d) 698; McComb v. Super-A Fertilizer Works, 165 F. (2d) 824.

Additional authorities supporting our position are as follows:

*Reynolds v. Salt River*, 143 F. (2d) 863

*Willey v. Decker*, (Wyo.) 73 P. 210

*Long on Irrigation*, Second Ed., Sec. 3

*Coffin v. Left Hand Ditch Co.*, 6 Colo. 443

*Koger v. Woods*, (New Mex.) 31 P. (2d) 256

*Yunker v. Nichols*, 1 Colo. 551, 553

*Perkins County v. Graff*, 114 F. 441

The following is taken from the opinion of the Colorado Supreme Court in *Yunker v. Nichols*, supra, handed down in 1872 while Colorado was still a territory; and which has been affirmed and reaffirmed as the basis of all subsequent "water laws" in Colorado:

"In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims recognition of the law. The value and usefulness of agricultural lands, in this territory, depend upon the supply of water for irrigation, and this can only be obtained by constructing artificial channels through which it may flow over adjacent lands. These artificial channels are often of great length, and rarely within the lands of a single proprietor. A riparian owner must usually get his supply of water from some point on the stream above his own land, and he is compelled to enter upon the lands of others in order to obtain it. Irrigating ditches cannot be made available at or near the head or point of divergence from the stream, and, while a riparian owner may be able to construct a ditch upon his own territory which shall overflow a portion of his land, he can never make it serviceable to the entire tract. Of course, lands situated at a distance from a stream cannot be irrigated without passing over intermediate lands, and thus all tilled lands, wherever situated, are subject to the same necessity. In other



lands, where the rain falls upon the just, and the unjust, this necessity is unknown, and is not recognized by the law. But here the law has made provisions for this necessity, by withholding from the land-owner the absolute dominion of his estate, which would enable him to deny the right of others to enter upon it for the purpose of obtaining needed supplies of water. \* \* \*

In *Reynolds v. Salt River Valley Water Users Assn.*, 143 F. (2d) 863, the Ninth Circuit had under consideration the applicability of this Act to the Salt River Valley Water Users Association which was engaged, not only in irrigation, but in the furnishing of water interstate. No exemption was claimed on account of the agricultural exemption in the Act. However, as applied to the raising of crops in Arizona, the opinion of the Ninth Circuit in this case is replete with applicable statement of facts similar to those in the present case and to facts of which that court took judicial notice and of which we submit this court will take judicial notice as to the relationship of irrigation to agriculture where in Arizona, as well as in Colorado, irrigation is essential to and constitutes an integral part of the production of agricultural crops.

As indicating that the Ninth Circuit in that case would have construed the agricultural exemption in the Act to be applicable if the exemption had been claimed and if the company's operations were limited to irrigation, we quote from the footnote on page 866 of the Federal report:

"Appellee did not make the affirmative plea that its employees were 'employed in agriculture' within the exemption of section 13 (a) (6) of the Act. That question was not raised here or in the court below. It is a question which well may affect the practice and rulings of the Wages and Hours Division of the Department of Labor in the performance of its functions under the Act. Our decision is without prejudice to the disposition of the question wherever appropriately presented." *Bair v. Oesterlein*, 275 U. S. 220, 225, 48 S. Ct. 87, 89, 72 L. Ed. 249."

## II.

The Administrator's contention and the ruling of the Court of Appeals that Petitioner's employees are engaged in the production of goods for commerce constitutes an effective admission that these employees are employed in agriculture.

The majority opinion of the Court of Appeals holds on the basis of the cases cited that Petitioner's employees (except bookkeeper-accountant as to whom no ruling was made) work is so intimately and essentially connected with the production of goods for commerce that those employees are within the general coverage of the Act. It is clear that these employees are not directly engaged in commerce. The holding is that they are engaged in the production of goods for commerce. The Administrator alleges in his complaint (R. 4), which is admitted by Petitioner in its answer (R. 7), agreed to in the stipulation of facts (R. 16-21), found by the trial court in its findings of fact (R. 114-115) and likewise found by the Court of Appeals (R. 128-132) that Petitioner's employees are employed in processes and occupations necessary to the production and in the production of agricultural goods such as "winter wheat, spring wheat, oats, barley, potatoes, beans, sugar beets, rye and other commodities." This, we submit, is an admission, agreement and finding that Petitioner's employees produce agricultural goods; whether they are produced for interstate commerce or not, and there is no allegation and no proof and no finding of the Court that any *other goods* have been produced by Petitioner's employees for commerce or for any other purpose. Unquestionably, these goods produced by Petitioner's employees are agricultural goods, which establishes the fact that said employees are employed in agriculture and are exempt from the Act under Section 13 (a) (6).

We submit, therefore, that the holding of the Court of Appeals that Petitioner's employees are engaged in the production of goods for commerce must necessarily be grounded upon the finding that they are engaged in the production of agricultural goods for commerce, which cannot be anything but agriculture, and must necessarily, for this reason alone, bring the Petitioner's employees within the agriculture exclusion of the Act.

The holding of the Court of Appeals that Petitioner's employees are engaged in the production of agricultural goods and still are not engaged in agriculture, we submit, is illogical, inconsistent and contradictory. If they are within the coverage of the Act at all, it is because they are engaged in the production of agricultural goods. They cannot be engaged in the production of agricultural goods unless they are engaged in agriculture.

### III.

**The conclusion that Petitioner's employees are employed in agriculture within the meaning of the Act is required, not only by the allegations of the Administrator's complaint, the stipulation of facts, the findings of the trial court and the language of the Court of Appeals as to the nature of the work performed by Petitioner's employees, but also by an analysis of the language of the Act itself and the administrative rules and regulations of the Administrator, which analysis now follows**

(a) *Congress used the word "agriculture" as a generic term that includes all activities of persons employed and all practices necessarily employed in the growing of agricultural crops.*

It must be assumed that Congress used the word "agriculture" in a broad sense, not only to include the activities of the employees engaged in agriculture, but to include all of the various practices, processes and occupations necessarily employed to produce agricultural crops under all of the many different physical, climatic and soil conditions known to exist in the vast expanse of territory over which the Fair Labor Standards Act of 1938 operates, namely, all of the States of the United States, the District of Columbia and all Territories and Possessions (including Porto Rico and Virgin Islands) of the United States. It is unthinkable and insulting to the intelligence of Congress to say that the Act only includes therein, or exempts therefrom, the labor of employees engaged in one uniform, unvarying and static form of agriculture, and by so doing ignore what every intelligent person knows, that there are as many kinds of agriculture, or practices employed therein for the growing of crops, as there are soils, climates and, in Colorado and the West, water conditions. Congress knew all of this.

(b) *The Fair Labor Standards Act of 1938 applies*

*only to employees engaged in commerce or in the production of goods for commerce, and their activities. It does not apply to employers, nor to their activities.*

This Court, in *Kirschbaum v. Walling*, 316 U. S. 517, 62 S. Ct. Rep. 1116, reviews the Congressional history of the Act, and says:

“As passed by the House, the Bill applied to *employers* engaged in commerce in any industry affecting commerce, but the Bill recommended by the Conference applied only to employees engaged in commerce or in the production of goods for commerce.

“Since the scope of the Act is not co-extensive with the limits of the power of Congress over commerce, the question remains whether these *employees* fall within the statutory definition of employees engaged in commerce, or in the production of goods for commerce.”

Consequently, it is immaterial who the *employer* of the employees may be, or what kind of an industry the *employer* may be engaged in, when the question of an agricultural exemption is being determined under Section 13 (a) (6) of the Act.

The only pertinent inquiry to be made is that made to ascertain the character of the labor and activities of the *employees*, and if their labor and activities are of an agricultural nature, they, *the employees*, are exempt from the Wage and Hour Provisions of the Act.

(c) *The term “production” as used in different sections of the Act must necessarily have the same meaning.*

Section 3 of the Act (Title 29, Sec. 203) containing the definitions of the different terms used throughout the Act provides

“As used in sections 201-219 of this title—(which includes the agricultural section, Title 29, Sec. 213)

“(j) ‘Produced’ means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an



employee shall be deemed to have been engaged in the production of goods if such employee was employed in *producing*, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the *production* thereof, in any State." (Emphasis supplied)

It will be noted that the word "produced", as defined in Section 3 (j) of the Act, is made applicable to that word as used throughout all the Sections of the Act, including Section 3 (f) defining "agriculture", which reads as follows:

"(f) 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the *production*, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." (Emphasis supplied)

We submit that a different meaning cannot be given to "production" when used in the same statute and, in fact, in the same section of the statute when Congress expressly stated in the preamble to that section that the defined meaning should be applicable when used throughout the entire statute. It must of necessity logically follow that the word "production" in Section 3 (f) and the same word in section 3 (j) have the same meaning. If, therefore, the work in which Petitioner's employees are engaged is "production" within the meaning of Section 3 (j) so as to bring such employees within the commerce coverage of the Act, that same work must necessarily be "production" within the meaning of Section 3 (f) that excludes such work from the coverage of the Act.

These employees are engaged in only one line of work and as it has been held by the Court of Appeals that this

line of work is the production of agricultural goods for commerce then certainly, both logically and legally, it must follow that they are engaged in the "production" of those same agricultural goods as the word "production" is included in the definition of agriculture in Section 3 (f). The same logical and legal principle and construction which the Court of Appeals felt justified its ruling that Petitioner's employees are engaged in the production of goods for commerce impels the conclusion that they are employed in agriculture.

(d) *"Agriculture" includes farming in all its branches. Congress intended to give a broad, rather than a limited, construction to its definition of the word "agriculture"*

The first few words of the definition of "agriculture" in Section 3 (f) of the Act states that agriculture includes *"farming in all its branches"*. We submit that irrigation is one of the four essential ingredients of agriculture, which, combined, are necessary to constitute agriculture. These are: (1) land; (2) seeds; (3) irrigation; (4) manpower. Without these and each of them there could not be agriculture or agricultural crops in any proper sense of the word in the semi-arid states, such as Colorado, where the application of water, through irrigation, is essential to the raising of crops.

The first words indicating a broad interpretation of agriculture are "agriculture includes farming in all its branches". This broad phrase includes all farm activities in all sections of the United States, and it also includes all the varying methods and practices employed by farmers in all sections of the United States, in order that these farmers may successfully raise crops under all of the diversified climatic and physical conditions that exist in all sections of the United States,—in those that have an over supply of rain, in those that have practically no supply of rain, and in those where rain is not sufficient for the raising of crops without a supplemental supply of water by irrigation. It will be noted that this broad phrase "farming in all its branches" is followed by the words "and among other things includes the production, cultivation, growing and harvesting of any agricultural or horticultural commodities", and so forth. This added clause, where certain activities are enumerated, serves

to emphasize the intent of Congress of giving the words "farming in all its branches" a very broad meaning. The enumeration of the particular activities does not confine the first broad phrase to the particular activities, but rather enlarges the meaning of the first broad phrase, "farming in all its branches".

We submit that the majority opinion is in error (R. 131-132) in holding that the agricultural exemption in the Act should be "narrowly construed" when the Act itself says that agriculture "includes farming in *all its branches*" and when, beyond question, irrigation is some branch of farming. That such a narrow construction of the term "agriculture" should not be applied is the holding of the Second Circuit in *Damutz v. Pinchbeck, Inc.*, 158 F. (2d) 882; 883, where it is stated:

"Although this exemption provision in a remedial statute should be construed strictly, it should, of course, be given due effect. It is drawn in far reaching language which shows the intent of Congress to make the term 'agriculture' cover much more than what might be called ordinary farming activity and that is what now controls. Different definitions of 'agriculture' in other statutes but indicate different Congressional methods in dealing with other matters and cannot serve to narrow the scope of this one."

and in the decision of the Fifth Circuit in *U. S. v. Turner Turpentine Co.*, 111 F. (2d) 400, 404, 405, where it is stated:

"\* \* \* It is now a settled principle of statutory construction that Congress or a legislature in legislating with regard to an industry or activity, must be regarded as having had in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity. When then, Congress in passing an act like the Social Security Act, uses, in laying down a broad general policy of exclusion, a term of as general import as 'agricultural labor', it must be considered that it used the term in a sense and intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections

of the United States where the act operates. This does not mean, of course, that a mere local custom which is in the face of the meaning of a general term used in an act, may be read into the act to vary its terms. It does mean, however, that when a word or term intended to have general application in an activity as broad as agriculture, has a wide meaning, it must be interpreted broadly enough to embrace in it all the kinds and forms of agriculture practiced where it operates, that its generality reasonably extends to. \* \* \*

An examination of the cases cited in Words and Phrases, Fifth Series, Vol. 1, p. 339 et seq., under agriculture and in 3 C. J. S., Agriculture, pages 361, 365 and 366, Sec. 1, under 'agricultural' and 'agriculture', convinces that in modern usage this is a wide and comprehensive term and that statutes using it without qualification, must be given an equally comprehensive meaning."

That a broad interpretation should be given to the term "agriculture" as used in the Act is further indicated by the following taken from the Congressional Record, Volume 83, page 9162, when Senator Thomas from Utah presented the revised bill for approval by the Senate. The following discussion of the agricultural definition took place:

"Mr. Johnson of California: 'I said that, in general language, agriculture is exempted from the operation of the bill.'

"Mr. Thomas of Utah: 'It is.'

"Mr. Johnson of California: 'Does the Senator know of any particular kind of agriculture that is included in the bill?'

"Mr. Thomas of Utah: 'I do not know of any. The definition seems to be all-inclusive, and we tried to make it so.'"

The following cases, along with those cited above and those hereinafter cited, clearly show that irrigation, not only in Colorado, but in all the semi-arid states of the west, is "agriculture" within the definition set forth in the Act.



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*Platte Water Co. v. Northern Colorado Irrigation Co.*, 12 Colo. 525, 529, 21 P. 711:

"The word irrigation, in its primary sense, is defined 'a sprinkling, or watering;' yet, according to the best lexicographers, it has an agricultural or special signification; 'The watering of lands by drains or channels.' Worcester. 'The operation of causing water to flow over lands for nourishing plants.' Webster. Considering the history of Colorado, the nature of its soil and climate, its constitutional and legislative enactments, as well as the decisions of our courts, we have no hesitation in saying that our legislators used the term 'irrigation' in the acts under consideration according to the common parlance of our people,—in its special sense,—as denoting the application of water to lands for the raising of agricultural crops and other products of the soil."

*Coffin v. Left Hand Ditch Co.*, 6 Colo. 443, 446:

" \* \* \* It has always been the policy of the national, as well as the territorial and state governments, to encourage the diversion and use of water in this country for agriculture; and vast expenditures of time and money have been made in reclaiming and fertilizing by irrigation portions of our unproductive territory. \* \* \*"

*Moyer v. Preston*, 44 P. 845, 847, 6 Wyo. 308:

"The soil is arid, and largely unproductive in the absence of irrigation, but, when water is applied by that means, it becomes capable of successful cultivation."

*Clough v. Wing*, 2 Ariz. 371, 17 P. 453, quoting from the syllabus:

"In Arizona, all the waters of non-navigable streams are devoted to agriculture by means of irrigation."

*Barnes v. Sabron*, 10 Nev. 217:

"In a dry, arid country like Nevada, where the

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rains are insufficient to moisten the earth, and irrigation becomes necessary for the successful raising of crops. \* \* \*

(e) "Agriculture" includes Cultivation and Tillage of the Soil.

The second line of the definition of "agriculture" in the Act so states. Interpretative Bulletin No. 14 of the Wage and Hour Division (R. 59-81) so states and further states (R. 63):

"3. The term 'cultivation and tillage of the soil' includes all the operations necessary to prepare a suitable seedbed, eliminate competing weed growth and improve the physical condition of the soil."

Certainly, under the stipulated facts and the findings of the trial court and by way of judicial knowledge, irrigation, including the services of Petitioner's employees in connection therewith, is an operation necessary to prepare a suitable seedbed, etc., within the interpretative administrative ruling of the Wage and Hour Division. An instructive discussion of this question is found in the opinion of the First Circuit in *Bowie v. Gonzales*, 117 F. (2d) 11.

(f) "Agriculture" includes "production, cultivation, growing and harvesting of all agricultural or horticultural commodities".

So states the third and fourth lines of the definition of "agriculture" in Section 3 of the Act. In support of this we cite, in addition to the other applicable cases heretofore and hereinafter cited, the following:

*Walling v. Rocklin*, 44 Fed. Supp. 355

*Walling v. Rocklin*, 132 F. (2d) 3

*Reynolds v. Salt River*, 143 F. (2d) 863

*Jordan v. Stark Bros.*, 45 Fed. Supp. 769

Pars. 5 (a), (b), page 5, *Interpretative Bulletin* 14 (R. 63).

It will be kept in mind that the reason the Administrator claims that the Petitioner's employees are subject to the Act is because he contends they are engaged in the production of goods for commerce. If so, then we submit

that production is the production of agricultural commodities, which is agriculture within the express words of the statutory definition of that term. Again, the Wage and Hour Division in its Interpretative Bulletin No. 14, paragraphs 5 (a) and (b), page 5 (R. 63, 64), expressly so states.

(g)—“Agriculture” includes all practices performed by a farmer as an incident to or in conjunction with such farming operations.

Congress again so states in Section 3 (f) of the Act. The courts have likewise so held, as well as the Wage and Hour Division in its Interpretative Bulletin No. 14.

*Walling v. Rocklin*, 132 F. (2d) 3

Par. 10, page 7, Interpretative Bulletin No. 14 (R. 65)

Par. 10, (f), page 9, Interpretative Bulletin No. 14 (R. 67).

(h) “Agriculture” includes “any process or occupation necessary to the production of goods in any State.”

This again is so stated in Section 3 (f) of the Act. It is supported by the authorities.

*Reynolds v. Salt River*, 143 F. (2d) 863

*Cook v. Massey*, 220 P. 4088 (Idaho); 38 Idaho 264.

It is specifically alleged in paragraph IV of the Complaint (R. 4) and in the stipulated facts (R. 17, 20) and the findings of the trial court (R. 112, 115, 119, 120).

(i) “Produced” means “produced, manufactured \* \* \* or in any other manner worked on in any state; and for the purpose of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, \* \* \* or in any other manner working on such goods, or in any process or occupation necessary to the production thereof in any state.”

The above is a quotation from Section 3 (j) of the Act which defines the word “produced” as used in the previous definition of the word “agriculture” in Section 3 (f). Cer-

tainly, irrigation, under the Complaint filed in this action, the stipulated facts, the findings of the trial court, the reported decisions and the court's judicial knowledge, is a "process or occupation necessary to the production" of agricultural products and is, therefore, within the statutory definitions of "agriculture". This is supported by the following, among other cases:

- Walling v. Rocklin*, 132 F. (2d) 3
- Kirschbaum v. Walling*, 62 Sup. Ct. Rep. 1116
- Jordan v. Stark Bros.*, 45 Fed. Supp. 769
- Walling v. Amidon*, 59 Fed. Supp. 294, Dist. Ct. Colo.

(j) "Goods," as defined by the Act, means "goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof."

Section 3 (i).

If Petitioner's employees are engaged in the production of "goods" for commerce, then clearly agricultural products are "goods" and, as we will now point out, the water furnished for the irrigation of crops is an "ingredient thereof".

(k) "Ingredient" means that which enters into a compound or is a component part of any combination or mixture; an element; a constituent.

- Webster's Unabridged Dictionary
- See discussion in *Walling v. Amidon*, 59 Fed. Supp. 294, Dist. Ct. Colo.

(l) "Water" is a part and an ingredient of agricultural crops.

- Reynolds v. Salt River Valley Water Users Ass'n*, 143 F. (2d) 963.

(m) All employees who are engaged in "the production of goods for commerce" and who do any of the things included in the definition of the word "agriculture" and referred to under preceding headings are



necessarily "employees employed in agriculture" and are exempt from Sections 6 and 7 of the Act.  
Sec. 13 (a) (6) of the Act.

- (n) *Irrigation labor is the same as agriculture labor.*  
State v. Tiffany, 87 P. 933 (Wash.)  
*Big Wood Canal Co. v. Unemployment Compensation*, 100 P. (2d) 49.  
*U. S. v. Turner Turpentine Co.*, 111 F. (2d) 400.

The Idaho Supreme Court in the Big Wood Canal Co. case states:

"\* \* \* Irrigating the land is as much 'agricultural labor' as is the plowing, grading, and cultivating the land after it is cleared of the sagebrush and greasewood. In the arid regions of the west, water is the vitalizing element of agriculture \* \* \*"

Further analysing the Fair Labor Standards Act of 1938 it is evident that it was passed by Congress:

To regulate "industries engaged in commerce or in the production of goods for commerce," for the benefit of workers in such industries. Sec. 2 (a) of Act.

To correct and eliminate the labor conditions referred to in such industries. Sec. 2 (b) of Act.

"Industries" is defined in the Act to mean "a trade, business, industry or branch thereof, or group of industries in which individuals are gainfully employed." Sec. 3 (h) of Act.

The Administrator of the Wage and Hour Division under the Act is required to appoint an *industry committee* for each *industry*, "engaged in commerce or in the production of goods for commerce." Sec. 5 (a) of Act.

In the appointment of the persons representing each of the three groups composing each *industry committee*, the Administrator "shall give due regard to the geographical regions in which the *industry* is carried on." Sec. 5 (b) of Act.

"Agriculture," when spoken of in the Act as being exempt (Sec. 13 (a) (6)), is an *industry*, that is, "a trade,

business, industry, or branch thereof, or group of industries in which individuals are gainfully employed." If agriculture is not such an industry, it is outside of the declared corrective policy of the Act (Sec. 2 (b)), and if outside of the corrective policy of the Act there is nothing in agriculture for the Administrator to correct by injunction proceedings, or otherwise.

Consequently, if this action is to be considered by this Court, it must be because agriculture is an industry (a trade or business) under the declared policy of the Act, engaged in the production of goods for commerce.

The trial court and the circuit court of appeals found that agriculture is an industry, when they held that the employees of petitioner are employed in the production of goods for commerce, namely, agricultural goods.

The Administrator considers that agriculture is an industry under the Act by issuing his exhaustive interpretative Bulletin No. 14, Exhibit 5, entitled "Agriculture" (R. 59 to 81).

In view of the foregoing analysis, it is apparent that, entirely independent of the broad all-comprehensive definition of the word "agriculture" (Sec. 3 (f) of the Act), Congress intended to, and did, by Sec. 13 (a) (6) of the Act, exempt from the provisions of Secs. 6 and 7 of the Act every individual that is employed in, or has any part in, the production of goods by an *agricultural industry*, irrespective of who employed him, and irrespective of the activities of his employer.

See *Bowie v. Gonzales*, 117 Fed. (2d) 11, supporting the above analysis of the Act as to agriculture.

#### IV.

**The Colorado Constitution permits the diversion of water from the public streams for agricultural purposes. The decrees entered by the courts of Colorado under the water adjudication statutes have decreed this water for exclusive use for agricultural purposes. This conclusively establishes that the Petitioner's employees while engaged in the diversion of this water from the public streams, transportation thereof through the Petitioner's canals, the storage thereof in the Petitioner's reservoirs, and the distribution thereof from the canals and reservoirs to the farmers for irrigation purposes are necessarily employed in agriculture**

Sections 5 and 6 of Article XVI, Colorado Constitution respectively provide:

"Water, public property.—The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

"Diverting unappropriated water—Priority.—The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

Samples of decrees to Petitioner's canals and reservoirs are attached to "Stipulation and Agreement as to Certain Facts" filed herein as Exhibits 3 and 3A. (R. 40-56).

It will be noted that these decrees only permit the Petitioner (petitioner, under the Colorado laws and court decisions, acts only for and in behalf of the farmers who apply the water to the raising of their crops) to divert the water from the public streams of Colorado for irrigation and agricultural purposes and incident thereto (R. 41, 42, 43, 47, 48, 51, 52, 54.) We submit that, when water from the public streams of Colorado can, pursuant to the constitution and statutes of the State of Colorado and the court adjudication decrees entered under such constitution and statutes, be diverted from the public streams of Colorado only for agricultural purposes, the men who are employed (by whomsoever employed) for the purpose of diverting that water from the public streams and seeing that it gets to

the farmers for use in the production of their agricultural crops are necessarily engaged in agriculture.

V.

The Court of Appeals has misconceived the nature of Petitioner and the relationship of Petitioner and its employees to its farmer stockholders in the production of agricultural crops. Petitioner, as a mutual ditch company, is merely the agent or trustee for the farmers who are the real owners of the water rights, including the ditches and reservoirs, and Petitioner's employees are, in substance, the employees of the farmers.

The majority opinion of the Court of Appeals (R. 132-133) grounds its holding that Petitioner's employees are not employed in agriculture within the meaning of that term as defined in the Act because Petitioner "is a corporate entity, separate and distinct from the farmers to whom it furnishes water for irrigation". We submit that even if this be true, Petitioner's employees, nevertheless, are engaged in irrigation, which is agriculture. As stated by this Court in a number of cases, it is the character of work performed by the employees rather than the nature of the employer which determines whether the employee is or is not subject to the Act or is not within one of the exemptions in the Act. *Overstreet v. North Shore Corp.*, 318 U. S. 125, 87 L. Ed. 656, 633, *Kirschbaum Co. v. Walling*, 316 U. S. 524, 86 L. Ed. 1648, *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, *McLeod v. Threlkeld*, 319 U. S. 491, 63 S. Ct. 1248, 87 L. Ed. 1538, 1542; 1544.

However, if the nature of the employee be at all material to the question as to whether Petitioner's employees are employed in agriculture, then we submit that the basic premise of the Court of Appeals that Petitioner is a corporate entity "separate and distinct from the farmers to whom it furnishes water for irrigation" is absolutely erroneous. We most earnestly solicit the careful analysis by this Court of the real nature of Petitioner inasmuch as the Court of Appeals' reversal of the District Court is based upon the above statement.

Admittedly, Petitioner is a mutual irrigation company. The majority opinion of the Court of Appeals so states (R. 132) and then makes no further reference to the facts



or the findings or the law as to what a mutual irrigation company is.

The dissenting opinion, to which we respectfully direct the Court's attention, as well as the opinion of the District Court, (R 99-106) correctly analyzes the nature of a mutual irrigation company.

The facts showing the true nature of Petitioner as a mutual ditch or irrigation company are covered and established by the stipulation of facts upon which this case was tried (R. 11-83). These facts are summarized in the Summary Statement set forth hereinabove, reference to which is here made.

The decisions, not only in the Colorado courts, but in the other western states, as well as the water right textbooks, clearly point out the unique character of mutual ditch or irrigation companies. The following quotation from the opinion of the Colorado Supreme Court in *Beaty v. Board of County Commissioners of Otero County*, 101 Colo. 346, 73 P. (2d) 982, 985, is typical of the description of a mutual ditch company in numerous decisions:

\* \* \* It definitely appears that this mutual canal company was organized for the convenience of its members in the distribution to them of their water for use upon their lands in proportion to their respective interests. Under these circumstances, the stock certificates of the canal company, in the form in which they were issued and held by the plaintiff, were merely the muniments of title to her water right, which water right, the thing of value owned by her, unquestionably was real estate and not corporate stock. This rule was clearly stated by Mr. Justice Butler in his concurring opinion, in which the majority of the court joined, in the case of *Comstock v. Olney Springs Drainage District*, 97 Colo. 416, 50 P. (2d) 531, 532 where it is said: "Counsel for the plaintiff in error admit—and it is the law—that water rights for irrigation are real property. They say however, that shares of stock are personal property. That is true of shares of stock in corporations, including irrigation corporations, organized

for profit; but where the company is a mutual irrigation company, or, as here, a mutual reservoir company, organized not for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water upon their lands in proportion to their respective interests, ownership of shares of stock in the corporation is but incidental to ownership of a water right, which is appurtenant to the land upon which the water is used. See *Ireton v. Idaho Irrigation Co.*, 30 Idaho 310, 317, 164 P. 687, 689. In *Kendrick v. Twin Lakes Reservoir Co.*, 58 Colo. 281, 144 P. 884, we had occasion to pass upon the status of the capital stock of one of the companies involved here. We said: "The corporation is purely a mutual reservoir company, in which the capital stock stands for and represents the consumer's interest in the reservoir, canal, and water rights." "

The above opinion of the supreme court of Colorado merely follows a long list of earlier opinions holding that a mutual ditch company is merely an agent or trustee for the farmers, who are the real owners of the water rights, including the ditches and reservoirs. *Farmers Ind. Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 43 P. 444; *Rocky Ford Canal, etc., Co. v. Simpson*, 5 Colo. App. 30, 32, 36 P. 638; *Comstock v. Drainage Dist.*, 97 Colo. 416, 419, 50 P. (2d) 531; *Wyatt v. Larimer & Weld Irr. Co.*, 18 Colo. 298, 308, 33 P. 144; *Monte Vista Co. v. Centennial Co.*, 24 Colo. App. 496, 498, 135 P. 981; *Kendrick v. Twin Lakes Res. Co.*, 58 Colo. 281, 144 P. 884; *Farmers Highline Canal, etc., Co. v. Southworth*, 13 Colo. 111, 21 P. 1028.

The majority opinion of the Court of Appeals (R., 132) erroneously applies to the general concept and nature of a mutual ditch company, such as Petitioner, the principle announced by this Court in *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, that a federal statute is not expanded to include some employees and limited to exclude others engaged in the same work, depending upon local statutory or judicial concepts. A mutual irrigation company, such as Petitioner, has its own nature and does not depend upon any mere local or judicial concept. As a

matter of judicial notice, the entire semi-arid western part of the United States raises its agricultural crops primarily through the means of irrigation. Furthermore, only a comparatively few acres of land are in such close proximity to the public streams that an individual farmer can get the water from the streams to his land. This has resulted in the farmers grouping themselves together in the form of mutual irrigation or ditch companies so that by their common enterprise and through the agencies of mutual ditch companies they can construct and operate their ditches and their reservoirs and divert from the streams and apply to their land the water in the public streams which the various state constitutions granted by the federal government provides they shall have the right to divert and apply to irrigation for agricultural purposes.

That a mutual irrigation or ditch company is not a form of operation peculiarly local to Colorado and that such a mutual ditch company is merely a matter of convenience or agency of the farmers in the irrigation of their lands is stated by the leading legal textbooks on irrigation and water rights. Quoting from *Water Rights in the Western States*, Third Edition, Volume 2:

"Sec 1266. Mutual Companies—Business, not Subject to Public Control.— \* \* \* Mutual Companies are usually such that shares of stock represent rights to specific quantities of water, and the stockholder's right to a supply rest upon his stock and not upon his status as a member of the public, the company being formed to supply water to its stockholders only. Such companies occupy a very great and extensive part of the Western irrigation field. \* \* \*

"Most of the irrigation in Southern California is done under mutual organization, in which each irrigator owns stock. The amount of stock held varies from a fraction of a share per acre to several shares per acre. Somewhat similar organizations are found in large numbers in other parts of California, particularly San Joaquin Valley (although there public service companies predominate). Co-operative organizations of one form or another are largely in

majority in Utah, and some of the most important irrigation systems of Colorado are under similar organization.

"Sec. 1267. Mutual Companies Continued. In Colorado, as elsewhere set forth, the consumer from a company's ditch is held to be an appropriator from the natural stream through the intermediate agency of the ditch, with a result approaching public ownership. Where the water users are numerous there is little difference between mutual companies and general companies under this view. The consumer in Colorado has all the rights of an appropriator as though himself diverting the water from its natural source, and the canal company is only an agent to carry the water to him. This has been held true of mutual companies as of other kinds, so that a stockholder in a mutual company in Colorado may bring suit like other appropriators to change his point of diversion, without the consent of the company. It is held in Colorado that a stockholder in a mutual ditch company may change his place of use so long as other stockholders are not injured, and a by-law to the contrary is invalid where not authorized by charter or expressly assented to by the stockholder. A right represented by a certificate, it has been held, may be lost by non-use, like appropriations from a natural stream.

\* \* \*

"Sec. 1338. The Rule in the Desert States.—  
\* \* \* The rule of the arid States is that (wholly irrespective of mutual companies, in private service) the consumer from a ditch is, through the intermediate agency of the ditch, an appropriator from the natural stream from which the company's ditch heads, and a part owner in the natural resource and in the canal and distributing system. \* \* \*

To the same effect is *Long on Irrigation*, Section 126, Pages 258, 259 and *Kinney on Irrigation and Water Rights* Second Edition, Chapter 75 Pages 2659, et seq.



The Idaho Supreme Court has well expressed the nature of a mutual ditch company in its recent opinion in *Big Wood Canal Co. v. Unemployment Comp. Division*, 61 Idaho 267, 100 P. (2d) 49; quoted from at some length in the dissenting opinion of Judge Phillips in this case (R. 135-136). From which quotation we extract the following:

" \* \* \* The fact, that the Big Wood Canal Co. employs and pays the men who tend and maintain the reservoirs and canals, and measure and deliver the water to the farmers, renders them no less laborers in the interest and field of agriculture, since the entire maintenance and operating expense is charged up to and prorated among the various farms and tracts of land to which the water is delivered as an appurtenance. \* \* \* The Big Wood Canal Co. is not a profit making corporation; it is merely a medium or instrumentality created to represent the farmers owning water rights from the reservoirs and is doing for them what each one can not do alone for himself. "

Again, as showing the majority opinion misconception of the nature of a mutual irrigation company, is the comment in *Kendrick v. Twin Lakes Res. Co.*, 58 Colo. 281, 144 P. 884, *Comstock v. Olney Springs Drainage Dist.*, 97 Colo. 416, 50 P. (2d) 531, and *Beatty v. Board of County Commissioners of Otero County*, 101 Colo. 346, 73 P. (2d) 982. On page 132 the majority opinion refers to these cases only as related to the imposition of special assessments or levying of ad valorem taxes. On the contrary, the important holding of these cases, which are in line with all of those above referred to, is that the farmer appropriator is the owner of the water right, which water right includes the ditches and the canals, and that the ditch company is merely the farmer appropriator's agent, organized as a matter of convenience, to secure his irrigation water. These cases show, what is apparent, that the water right is appurtenant to the land and the ditches and reservoirs are a part of the water right and are, consequently, a part of or appurtenant to the land on which the irrigation actually takes place and the crops are raised.

We most earnestly but respectfully again insist that the majority opinion of the Court of Appeals in this case has misconceived the nature of the Petitioner as a mutual ditch company. While it is technically a corporate entity, it is not, as stated in the majority opinion, "separate and distinct from the farmers to whom it furnishes water for irrigation". Petitioner is not, as stated in the majority opinion, "a company engaged in diverting water, storing water, and delivering water to farmers at their laterals for irrigating lands of the farmers, and in keeping the property of the company in operating condition, all separate and distinct from the farming operations of the farmers" (R. 133). It is true that the ditch riders and lake tenders do not do all of the work necessary to the raising of the crops by the farmer stockholders any more than does an employee who may attend to the horses, or do nothing more than plowing, or nothing more than cultivating, but he is engaged in an essential part of the farmer's activities in raising his agricultural crops. Petitioner is not an independently operated irrigation corporation. It is as stated in the dissenting opinion, "nothing more than a mutual agency organized for the convenience of the owners of land and appurtenant water rights." This necessarily follows from the facts stipulated in this case and found by the trial court and recognized by the decisions of the Supreme Court of Colorado and other states and the water right textbooks.

We submit that, as found by the trial court (R. 120), the Petitioner's employees are, in truth and in fact, through and by reason of the agency of Petitioner for its stockholders, for all intents and purposes, employees of the farmer-stockholders of Petitioner. As stated by Judge Phillips in his dissenting opinion (R. 135) Petitioner's employees "are, in substance, the employees of the land-owners."

#### VI.

**Petitioner, its employees and its farmer-stockholders are engaged in one united effort to bring land and water together for the irrigation of agricultural crops and are not engaged in a commercial or industrial activity separate and apart from "agriculture".**

Both the Trial Court and the Circuit Court of Appeals in their Opinions clearly show that in the arid states of

the west irrigation of farm lands is "per se agriculture". We do not believe that the Administrator will seriously contend that irrigation of farm lands in the arid states of the west is not "per se agriculture". The Trial Court, also recognized the unity of Petitioner, its employees and its farmer-stockholders, thus supporting its decision in a two-fold manner as follows: (1) Irrigation of farm lands is "per se agriculture" regardless of who does the work; and, (2) The agricultural activity of the Petitioner and its employees is the agricultural activity of the farmer whose lands are made more productive by the application of the water owned by the farmer, but delivered to the farmer through Petitioner's (farmer's) irrigation system. The record herein, as we have analyzed it, shows that the farmer-stockholder is the landowner, and also the owner of the water needed for the irrigation and growing of agricultural crops and that his and their (all farmers) problem is to bring land and water together for the raising of agricultural crops and in order to accomplish that end, he and they have, for their own united convenience, established an agency, namely, the Petitioner, to bring land and water together, which agency in turn employs employees to accomplish that united result. The majority Opinion of the Circuit Court of Appeals fails to recognize this unity and the singleness of purpose between Petitioner, its employees and its farmer-stockholders, and because Petitioner owns no farms and is a corporate entity finds that the agricultural activity (irrigation of farm lands) performed by Petitioner and its employees changes to a commercial or industrial activity. We anticipate that the Administrator in an effort to support the Opinion of the Circuit Court of Appeals will call this Court's attention to the following authorities: *McComb v. Super-A. Fertilizer Works*, 165 Fed. (2d) 824 (C.C.A. 1); *North Whittier Heights Citrus Ass'n v. National Labor Relations Board*, 101 Fed. (2d) 76 (C.C.A. 9); *Meeker Co-operative Light and Power Ass'n v. Phillips*, 158 Fed. (2d) 698, (C.C.A. 8); and, *Lake Region Packing Ass'n v. United States*, 146 Fed. (2d) 157, (C.C.A. 5).

It is our opinion that all of the last cited cases are clearly distinguishable from the present dispute because the facts involved in each of the cited cases are in no way

analogous to the facts now presented to this Court in this controversy. In each and every one of the last cited cases the Courts were dealing with established commercial or industrial enterprises whose employees were clearly employed in a commercial or industrial activity, although helpful to the farmer, which has never been classified as "per se agriculture."

In *North Whittier Heights Citrus Ass'n. v. National Labor Relations Board*, supra, on page 89 of the reported decision it is said:

"Industrial activity commonly means the treatment or processing of raw products in factories. When the product of the soil leaves the farmer, as such and enters a factory for processing and marketing it has entered upon the status of 'industry'. In this status of this industry there would seem to be as much need for the remedial provisions of the Wagner Act, upon principle, as for any other industrial activity.

"Petitioner maintains that the nature of the work is the true test. Perhaps it would more nearly conform to the true test to say that the nature of the work modified by the custom of doing it determines whether the worker is or is not an agricultural laborer."

In *Lake Region Packing Ass'n. v. United States*, 146 F. (2d) 157, the Fifth Circuit in speaking of a farmers cooperative said:

"\* \* \* For it is quite clear that here, is a case not of packing, processing and marketing as incidental to ordinary farming operations, but one, the essence of which was a commercial operation. Because this is so, those acts, which were not performed in the field or in connection with getting the product from the field to the place of processing and were therefore not per se agricultural, are deprived of their agricultural character by the dominance in the operation of their commercial character. \* \* \* (Emphasis ours)

An analysis of the decision in *McComb v. Super-A Fertilizer Works, Inc.*, supra, shows clearly that the Court based



its holding upon the industrial character of the fertilizer company involved in that case as defendant.

It is our position and we believe the position of this Court as evidenced by its many Opinions involving water rights in the western states, that irrigation such as the type that is performed by Petitioner is "per se agriculture" and has never been a commercial and industrial activity that can be treated as separate and distinct from "agriculture."

## VII.

**Meaning and purpose of Fair Labor Standards Act is clearly expressed by Congress and needs no construction by the Courts but only needs enforcement of its plain provisions.**

In the case of *United States of America v. Standard Brewery, Inc.*, 251 U. S. 210, 64 L. Ed. 229, 234, it is said:

"Nothing is better settled than that, in the construction of a law, its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within the constitutional authority of the legislative body which passed it. \* \* \*

The purpose of the Act as well as its meaning is plain. Congress intended, as it says in the Act, to correct, and as rapidly as practicable to eliminate, certain detrimental labor conditions existing in *industries* engaged in commerce or in the production of goods for commerce, except such industries as "agriculture" expressly exempted. It is also plain from the language of the Act that every employee employed in agriculture is exempt from the Act. It only remains for the Administrator to follow the plain language of the Act and ascertain the character of the labor and activities of each employee and grant the exemption if his labor and activities are of an agricultural nature.

There is no excuse for the Administrator to invoke the well-established rule of a narrow construction of the word "agriculture", that Congress placed in the Act and apply it to the facts in this case, for there is no need of construction. Under the guise of the construction rule, the Administrator asks that this Court *eliminate* from the definition of "agriculture" the word "produced", and from the definition of "pro-

duced," the phrase "or in any process or occupation necessary to the production thereof in any State," and to insert a proviso in the Act, that does not now appear, that any employee who is employed in agriculture shall *not be exempt* if he is doing this agricultural work for, and being paid therefor by, a *mutual ditch company* that is acting as trustee or agent for its farmer-stockholder.

The Administrator issued his Interpretative Bulletin on "Agriculture" (R. 59-80) from which we quote:

"2. Section 13 (a) (6) of the Fair Labor Standards Act exempts from both the wage and hour provisions any employee employed in agriculture: \* \* \*

"An employee is exempt by virtue of section 13 (a) (6) if, but only if, his work falls within the specific language of section 3 (f). \* \* \*

"\* \* \* Employees engaged in the described operations are not subject to the wage and hour provisions of the act (R. 62-63).

"3. The term 'cultivation and tillage of the soil' includes all the operations necessary to prepare a suitable seedbed; eliminate competing weed growth and improve the physical condition of the soil." (R. 63.)

"5. (a). The term 'production, cultivation, growing \* \* \* of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended)' includes all customary operations in connection with raising any 'agricultural or horticultural commodities.' The term 'harvesting of any agricultural or horticultural commodities' includes all operations customarily performed in connection with the removal of the crops by the farmer from their growing position in the field, greenhouse, etc. The act, it should be noted, makes no distinction between employees on the basis of the purpose of their employers in producing, cultivating, growing, and harvesting agricultural or horticultural commodities \* \* \* (R. 63).

"10. The term 'practices (including any forestry or

lumbering operations) performed by a farmer \* \* \* as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market involves many diverse matters. \* \* \*

It should be noted with respect to all of these practices that they must be performed by the farmer and his employees and that such practices must be incident to or in conjunction with the farming operations of the farmer. It makes no difference whether they are performed on or off the farm if performed by a farmer. The line between practices which are incident to or in conjunction with farming operations, and those which are not, is not susceptible of precise definition. The agricultural exemption, however, would seem to include only practices which constitute a subordinate and established part of the farming operation. \* \* \* (R. 65-66)

(f) Besides the practices listed in the statute as being incident to or in conjunction with farming operations, there are other practices included within the exemption." (R. 67)

This Court in *Kirschbaum v. Walling*, 316 U. S. 517, 86 L. Ed. 1638, 1648, said:

\* \* \* But the provisions of the Act expressly make its application dependent upon the character of the employees' activities. And, in any event, to the extent that his employees are 'engaged in commerce or the production of goods for commerce', the employer is himself so engaged. Nor can we find in the Act, as do the petitioners, any requirements that employees must themselves participate in the physical process of the making of the goods before they can be regarded as engaged in their production. Such a construction erases the final clause of Section 3 (j) which includes employees engaged 'in any process or occupation necessary to the production' and thereby does not limit the scope of the statute to the preceding clause

which deals with employees in any other manner working on such goods.

It is clear from the Administrator's Interpretative Bulletin and from the holding of this Court in the case of *Kirschbaum Co. v. Walling*, supra, as indicated by the quoted remarks above, that each and every portion of each and every section of the Act must be read and enforced in accordance with the plain meaning expressed by Congress.

### VIII.

**Coler—Bookkeeper-accountant, if not employed in agriculture he is not employed in the production of goods for commerce. (Cause No. 196.)**

All parts of our argument heretofore made are in support of our contention that Coler, bookkeeper-accountant of Petitioner, is an employee employed in agriculture. The character of Coler's work in behalf of Petitioner and its farmer-stockholders is described in the Stipulation of Facts (R. 22). In general, he acts as a bookkeeper and accountant, having charge of the Petitioner's books and financial records, showing bank balances, withdrawals and expenditures, and preparing financial statements for the stockholders. He examines and checks the daily diary or work reports from each ditch rider, or lake tender and apportion the different expenditures and receipts to the proper accounts. In the absence of the Secretary he has charge of and keeps the records of the assessments paid by the stockholders and the records relating to water deliveries. It was expressly stipulated and also found by the Trial Court that all of Coler's work is necessary in the conduct of Petitioner's business (agriculture) and in keeping a correct account of its records.

As we have pointed out above, if Coler is not an employee employed in agriculture, then, clearly he is not within the coverage of the Act, because not engaged in commerce, or in the production of goods for commerce, or in any process or occupation necessary to the production of goods for commerce. Coler, himself, is an office employee, and has nothing directly to do with the diversion of the water out of the public streams, or in the carriage of the same through the irrigation system, or the distribution of same onto the farmers' lands. The Trial Court specifically found that Coler



is not engaged in commerce or in the production of goods for commerce as defined in the Fair Labor Standards Act of 1938 (R. 118). The Circuit Court of Appeals, as indicated above, did not affirm or disaffirm this finding.

In *McLeod v. Thrallkeld*, 319 U. S. 491, 87 L. Ed. 1538, 1544, this Court said:

"It is the work of the employee which is decisive."

We submit that the decisions have not and should not go to the extent of holding that an employee, doing the character of work that Coler does, which, only by stretching the imagination, can be said to be related to commerce, and, then only in a very remote degree, should be held to be engaged in commerce or in the production of goods for commerce. However, if it should be held that Coler is so engaged, then the reason must be, and can only be, because he is engaged with Petitioner and all of its employees in a united effort to foster and maintain agriculture.

### CONCLUSION

This Court in the case of *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 88 L. Ed 1488, 1493, 1496, said: (at page 1493)

"Congress provided for eleven exemptions from the controlling provisions relating to minimum wages or maximum hours of the Fair Labor Standards Act. *Employment in agriculture is probably the most far-reaching exemption.* \* \* \*" (Emphasis ours)

(at page 1496)

" \* \* \* After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

The above quoted remarks of this Court should stand as a beacon-light to the Administrator in his application of the Act to "employees in agriculture". If you speak of agriculture to the farmers of the arid states of the west, they immediately visualize an area dotted with irrigation canals and

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reservoirs, by and from which the most needed ingredient, water, is supplied to the agricultural crops. Every farmer of the arid states of the west knows that agriculture would exist only in a very limited degree without irrigation and many of the agricultural crops that are now grown in the arid states of the west because of irrigation would not and could not be grown if the land and crops were deprived of water.

We respectfully submit that Petitioner, its employees and its farmer stockholders are joined together as a single unit seeking, by their combined and united efforts, to foster and maintain, in accordance with the universal and customary practices necessarily employed in the arid states of the west, "agriculture".

The decision of the Trial Court based upon the stipulated facts as shown by the record herein should be upheld.

Dated, November, 1948.

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## APPENDIX

Sections of Fair Labor Standards Act of 1938 referred to in foregoing brief.

(References are to both the sections of the Act itself and to the same sections as appear in Title 29, U.S.C.A.).

### FINDING AND DECLARATION OF POLICY

Title 29, U.S.C.A., Sec. 202.

"Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

"(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power."

### DEFINITIONS

Title 29, U.S.C.A., Sec. 203

Sec. 3. As used in this Act—

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee but shall not include the United States, or any State or political subdivision of a State, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(e) "Employee" includes any individual employed by an employer.

(f) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

(h) "Industry" means a trade, business, industry, or branch thereof, or group of industries, in which individuals are gainfully employed.

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part of ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.



"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

### MAXIMUM HOURS

Title 29, U.S.C.A., Sec. 207.

"Sec. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a work week longer than forty-four hours during the first year from the effective date of this section.

### EXEMPTIONS

Title 29, U.S.C.A., Sec. 213

"Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); \* \* \* or (6) any employee employed in agriculture; \* \* \*

### PROHIBITED ACTS

Title 29, U.S.C.A., Sec. 215

"Sec. 15. (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

(2) to violate any of the provisions of section 6 or section 7 or any of the provisions of any regulation or order of the Administrator issued under section 14:

### **INJUNCTION PROCEEDINGS**

Title 29, U.S.C.A., Sec. 17

"Sec. 17. The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U.S.C., 1934 edition, title 28, sec. 381), to restrain violation of section 15."

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Supreme Court of the United States

The following is a list of the cases decided by the Court in the term ending June 1, 1912.

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U.S. v. Belmont, 101 U.S. 384, 12 S.Ct. 100, 33 L.Ed. 100.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948

No. 128

THE FARMERS RESERVOIR AND IRRIGATION COMPANY,  
A Corporation, *Petitioner*

v.

WILLIAM R. McCOMB, Administrator of the Wage  
and Hour Division, United States Department  
of Labor

On Petition for a Writ of Certiorari to the United States Circuit  
Court of Appeals for the Tenth Circuit.

**BRIEF FOR THE RESPONDENT IN OPPOSITION**

**OPINIONS BELOW**

The findings of fact and conclusions of law of the district court (R. 107-121) are not reported. The majority and dissenting opinions of the circuit court of appeals (R. 127-137) are reported at 167 F. 2d 911.

### JURISDICTION

The judgment of the circuit court of appeals was entered on April 23, 1948 (R. 138). Respondent's petition for rehearing was denied on May 25, 1948 (R. 146). The petition for certiorari was filed on June 28, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended.

### QUESTION PRESENTED

Whether the "agriculture" exemption provided in Section 13(a)(6) of the Fair Labor Standards Act extends to ditch riders, reservoir tenders, and canal maintenance men, who perform no services on farms and are employed by an irrigation company which owns no farm lands and raises no crops but is an independent corporate entity engaged in supplying water to its farmer-stockholders.

### STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 203 and 213, are as follows:

SEC. 3(f): "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section

15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

SEC. 13(a) The [minimum wage and overtime] provisions \* \* \* shall not apply with respect to \* \* \* (6) any employee employed in agriculture; \* \* \*

#### STATEMENT<sup>1</sup>

Petitioner, a Colorado corporation with its principal office and place of business in Denver, Colorado, owns, operates and maintains a system of irrigation canals and reservoirs for the purposes of diverting water from the public streams of Colorado, and of storing and transporting it to individual stockholders of the corporation for use in irrigating farm land (R. 107). The owners of dry grazing and unproductive lands organized the corporation for the purpose of operating an irrigation system to convert their lands into irrigated farm lands (R. 107-108). The corporation borrowed

<sup>1</sup> The case was heard on stipulated facts (R. 11-58) which are summarized in the findings of the district court (R. 107-121).



money by selling bonds to the public which are now outstanding in the amount of \$450,000 and by other means, and planned, surveyed and constructed the irrigation system. (R. 58, 107-108.) This irrigation system extends through 300 to 400 miles of canals located in several counties of Colorado, includes four large and a number of small water storage reservoirs and is used to irrigate approximately 100,000 acres of farm land (R. 107-108, 109). Petitioner corporation owns no farm lands but has title to the lands upon which the canals and reservoirs are located and, in some instances, is a joint owner with other irrigation companies of certain canals in its irrigation system (R. 108, 109). Certain of the canals have their headgates on South Platte River, Clear Creek, Boulder Creek or other public streams in Colorado from which water is diverted and then carried through the canal and reservoir system to the farmers' lateral ditches which extend from their farms to petitioner's canals (R. 108).

Petitioner's stockholders, for the most part, are farmers whose products are regularly shipped in substantial amounts in interstate commerce (R. 113-114). Each share of stock entitles the owner to a pro rata share of the available water supply of the irrigation system (R. 107-109). The funds necessary for maintaining and operating the irrigation system and for other corporate purposes are obtained by annual assessments upon the stock-

holders (R. 107), and also from lease rentals for duck hunting and similar purposes on some of its reservoirs, and from reimbursement by other irrigation companies for the operating expenses of certain jointly owned irrigation canals (R. 111-112).

The petitioner has four main classes of employees: (1) lake or reservoir tenders, (2) ditch riders, (3) maintenance men, and (4) employees in the Denver office of the company (R. 114). Water is delivered by the company's employees from the storage reservoirs through the distributing and diversion headgates into the individual farmer's laterals (R. 110). None of the company's employees have anything to do with the application or use of the water after it is turned out of the company's canals into the individual laterals of the farmers (R. 110-111).

The ditch riders, lake tenders and maintenance men vary in number from sixteen to twenty-six (R. 116). The lake or reservoir tenders perform maintenance work upon the company's storage reservoirs and also operate the intakes and outlets of the reservoirs (R. 114). During the irrigation season, they release water from storage to fill the daily requirements of the stockholders (R. 114). In most instances, the lake or reservoir tenders also act as

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<sup>2</sup> The only employee in the Denver office of the company involved in the litigation was petitioner's bookkeeper, who was held by the court below to be exempt as an administrative employee.

ditch riders and are charged with the maintenance of sections of the canals, and the delivery of the water to the farmers (R. 114). Each of the company's ditch riders has a specified section of canals to control, generally varying in length from five to fifteen miles. From day to day, during the irrigation season, the ditch rider receives requests for water along his section of the canal. If direct irrigation water is then being delivered, the ditch rider divides the water for distribution to the farmers. If storage water is being delivered, the ditch rider notifies the lake tender or superintendent of the company at the Denver office so that water may be turned out of the lake or reservoirs. The ditch rider sets the headgate or weir on the company's canals to divert the required amount of water into the farmers' individual laterals. From this point the farmer has sole charge of the carriage of the water through his lateral and the application of the water to the land. (R. 114-115.)

In order to insure the uninterrupted flow of water through the company's irrigation system, the reservoir tenders and ditch riders also perform maintenance work on the company's irrigation system, including the dams, reservoirs, embankments, structures, and all stream diversion works. They keep the canals free from weeds, rubbish, and sand; they keep the diversion headgates and weirs to the farmers' laterals in good repair and operating order; they patrol the canals, reservoirs, and other

appurtenant structures and attend to diverting the water from the natural streams and the reservoirs; they conduct and run the water through and out of the canals and reservoirs. (R. 115.)

During the irrigation season, the ditch riders generally spend five to six hours a day in patrolling their respective sections of the company's canals, delivering the water to the laterals, and performing maintenance work on the canals. They generally spend two to three hours daily in preparing reports sent to the company's main office setting forth the amount of water which has been delivered to each farmer. (R. 116.) During the storage season, which covers the late fall, winter, and early spring months, the company's employees are engaged in general repair and maintenance work necessary to the operation of the company's irrigation system and work approximately eight hours a day for six days a week (R. 116).

The district court found that all the employees discussed above were engaged in the production of goods for commerce and that they worked more than the statutory number of hours without receiving overtime compensation as required by the provisions of the Act (R. 116, 121). The trial court dismissed the complaint, however, on the theory that all the employees were exempt from the Act under Section 13(a)(6) as employees employed in agriculture (R. 121). The circuit court of appeals reversed the judgment, stating that "employees of



a company engaged in diverting water, storing water, and delivering water to farmers at their laterals for irrigating lands of the farmers, and in keeping the property of the company in operating condition, all separate and distinct from the farming operations of the farmers, are not engaged in agriculture within the intent and meaning of section 13(a)(6)." (R. 133).

#### ARGUMENT

1. Petitioner's first contention (Pet., pp. 15-27), that its employees are within the agricultural exemption because their work is necessary to the production of agricultural commodities, misconceives the scope of the exemption which, like other exemptions from this Act, must "be narrowly construed" to extend only to "those plainly and unmistakably within its terms and spirit." *Phillips Co. v. Walling*, 324 U. S. 490, 493. As the court below observed (R. 133), these employees were not engaging in any of the activities specified in the definition of agriculture but on the contrary were engaging in activities "separate and ~~distinct~~ from the farming operations of the farmers." The decisions of the other circuit courts of appeals accord with the decision below in denying the exemption to employees whose activities, although necessary to agricultural production, do not fall within the terms of the statutory definition. In *Meeker Cooperative Light & Power Ass'n v. Phillips*, 158 F. 2d 698

(C. C. A. 8), the agricultural exemption was held inapplicable to employees maintaining electric power lines, supplying electricity used in the operation of farm machinery. Similarly in *McComb v. Super-A Fertilizer Works*, 165 F. 2d 824 (C. C. A. 1), the exemption was held inapplicable to employees producing fertilizer for use in raising agricultural commodities.

These decisions accord also with the decisions of this Court which have recognized that performing functions "necessary to" a given activity is to be distinguished from directly engaging in such activity. Thus the fact that an employee's work may be "necessary to" production for commerce is insufficient to establish that he is "engaged in commerce" within the coverage provisions of the Act. Cf. *Armour & Co. v. Wantock*, 323 U. S. 126, 131; *McLeod v. Threlkeld*, 319 U. S. 491; *Kirschbaum Co. v. Walling*, 316 U. S. 517. *A fortiori*, the fact that an employee's work is necessary to an exempt activity does not suffice to bring such employee within the scope of an exemption, which must be strictly construed.

Petitioner's contention that if its employees are engaged in production of goods for commerce within the coverage provisions of the Act, they are necessarily engaged in "production" of agricultural commodities within the scope of the "agriculture exemption", is refuted by clear evidence in the legislative history that the word "production"

in this exemption was used by Congress in a limited agricultural sense, and was not intended to have the broad scope of the Section 3(j) definition. As correctly pointed out by the First Circuit Court of Appeals, with which the court below agreed, the word "production" in the "agriculture" exemption, as shown by the legislative history, was inserted into the exemption provision simply "to extend the exemption to additional agricultural activities, such as the extraction of resin, which might not be included by use of words like cultivation or growing." *McComb v. Super-A Fertilizer Works*, 165 F. 2d 824, 828 (C. C. A. 1). The legislative history discloses that the term "production" was incorporated into the definition of agriculture by the Conference Committee on the eve of the enactment of the legislation in connection with the insertion of the parenthetical phrase "(including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended)." See the Conference Report (H. Rep. 2738, 75th Cong., 3rd sess., p. 29), where the explanation of the definition of agriculture uses the word "production" only with reference to the Agriculture Marketing Act. Section 15(g) of that Act relates to the extraction of oleoresin for the production of turpentine and rosin (46 Stat. 1550, 12 U. S. C. sec. 1141j(g)). Since prior court decisions had raised doubts whether the phrase "cultivation, growing, or harvesting" could embrace

the turpentine and rosin processes (*Union Naval Stores v. United States*, 240 U. S. 284, 289; *United States v. Waters-Pierce Oil Co.*, 196 Fed. 767, 770 (C. C. A. 8)), Congress added the word "production" to the definition of agriculture to include those processes. Thus it is clear that "production" in the statutory definition of agriculture was used only in its agricultural sense and not in the broad "technical sense" of the definition of "produced" in Section 3(j).<sup>3</sup> See *McComb v. Super-A Fertilizer Works*, *supra*, at 828.

Not only is there specific legislative history to support the ruling of the court below, but it would lead to ridiculous results to accept petitioner's contention that the all-inclusive definition of "produced" in Section 3(j) was incorporated into the definition of agriculture. To give the agriculture exemption such scope would not only render much of the definition mere surplusage (cf. *Ex parte Public National Bank of New York*, 278 U.S. 101, 104); but would also expand the definition to include many manufacturing activities plainly outside the contemplation of the exemption, such as

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<sup>3</sup> It may be noted that Section 3(j) does not define the word "production" as such. It defines "produced" and refers to the phrase "production of goods," the identical phrase used in Sections 6 and 7(a) to describe those covered by the Act. The phrase "production of goods" in Section 3(j) thus refers specifically to the same phrase in Sections 6 and 7(a) and not to the single word "production" as used in Sections 3(f), 7(e), 9 and 13(a) (10).



the manufacture of tractors, plows or other farm implements, or the production of electric power for use on farms.<sup>4</sup> It clearly "was not the intent of Congress to exempt [such] industrial activity necessary to the production of agricultural goods which go into commerce." *McComb v. Super-A Fertilizer Works*, *supra*, at 828, citing *Mecker Cooperative Light & Power Ass'n v. Phillips*, *supra*.

2. As noted above, the decision below is in accord with the decision of the First Circuit in *McComb v. Super-A Fertilizer Works*, 165 F. 2d 824, where a contention identical to petitioner's was explicitly rejected, and with the decision of the Eighth Circuit in *Mecker Cooperative Light & Power Ass'n v. Phillips*, 158 F. 2d 698. We are aware of no contrary authorities. None of the decisions which petitioner cites (Petition, p. 12, citing *Damutz v. Pinchbeck*, 158 F. 2d 882, 883 (C. C. A. 2); *United States v. Turner Turpentine Co.*, 111 F. 2d 400, 404 (C. C. A. 5); and *Walling v. Rocklin*, 132 F. 2d 3 (C. C. A. 8)) presents any conflict. In the *Damutz* case the court, relying on the Administrator's interpretative bulletin, correctly held that one employed by a producer of horticultural commodities

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<sup>4</sup> Further evidence that Congress did not use the word "production" in the same sense throughout the Act may be found in Section 9, which refers to the "production" of documents, and Sections 13(a)(10) and 7(c), which refer to the area of "production." Plainly the word "production" in those sections does not include "any process or occupation necessary to" production.

to render services (the tending of boilers which supplied heat for greenhouse plants) which were an integral part of the growing and cultivation was exempt as an employee "employed in agriculture." The decision in that case is of no relevance here where the employees are not employed by a farmer or a grower of agricultural commodities and do not work on the farm or the premises where the commodity is grown. The *Turner Turpentine* case held that the 1939 amendment to the Social Security Act specifically defining "agricultural labor" as including turpentine production and processing should be regarded as interpretative and explanatory of the term as used in the original Act, rather than as changing the original scope of the term. It is not apparent how a holding that the production and processing of turpentine is agricultural labor (explicitly recognized as such in the definition of "agriculture" in the Fair Labor Standards Act) conflicts with the holding that work on the reservoirs and canals of an irrigation company is not. The *Rocklin* case, like the *Damutz* case and unlike the instant case, involved an employee who was concededly employed by a farmer and who was engaged in the distribution of farm products. It is therefore not in conflict with the decision below.

<sup>5</sup> See, moreover, *Chester C. Fosgate Co. v. United States*, 125 F. 2d 775 (C. C. A. 5), where the same court of appeals in a subsequent case virtually repudiated its reasoning in the *Turner Turpentine* case on this point and acknowledged that its decision in the *Turner* case was strictly "limited to the matter before the Court" in that case.

3. Petitioner's contention (Petition, pp. 28-34) that its employees are, in substance, the employees of the farmer-stockholders, and therefore exempt because they are employed "by a farmer" even though not "on a farm," is contrary to the stipulated facts as well as clearly untenable as a matter of law. The stipulated facts establish that petitioner is a separate corporate entity acting through its officers who are selected by the stockholders, and that the title to the land upon which the canals and reservoirs are located stands in petitioner's name. (R. 13, 25-40). This Court's decision in *Boutell v. Walling*, 327 U. S. 463, construing another exemption provision of this same Act, establishes that the corporate entity cannot be disregarded in order to give an employer the benefit of an exemption from the Act, even though the employees would have been exempt if no separate entity existed. See also *Schenley Distillers Corp. v. United States*, 326 U. S. 432, 437. See also the consistent line of decisions holding that persons employed by farmers' non-profit cooperatives are not by virtue of that fact agricultural laborers. *North Whittier Heights Citrus Ass'n v. National Labor Relations Board*, 109 F. 2d 76 (C. C. A. 9); *Meeker Cooperative Light & Power Ass'n v. Phillips*, 158 F. 2d 698 (C. C. A. 8); *Lake Region Packing Ass'n v. United States*, 146 F. 2d 157, 159 (C. C. A. 5). The suggestion that the separate entity should be disregarded because of the "unique character" of water rights

under the State laws (Petition, pp. 29-31) is, as pointed out by the court below (R. 132), sufficiently answered by this Court's decision in *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111. "The statute is not expanded to include some employees and limited to exclude others engaged in the same work, depending upon local statutory or judicial concepts" (See decision below, R. 132). Even if it be assumed that petitioner has correctly appraised the local law,<sup>6</sup> the technical scope of property rights under the State law cannot be assumed to be engrafted on a general Federal statute, particularly on a statute whose express purpose is the establishment of uniform national standards. See *Brooklyn Savings Bank v. O'Neil*, 324 U. S. 697, 710 (pointing out "the Congressional policy of uniformity in the application of the [Fair Labor Standards] Act \* \* \*"). See also *Labor Board v. Hearst Publications*, *supra*, at 123-126. Whatever may be the nature of the farm-

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<sup>6</sup> There is substantial doubt of the accuracy of petitioner's appraisal. This Court has recognized that the property right in water may be "separate and distinct from the property right in the reservoirs, ditches or canals." See *Nebraska v. Wyoming*, 325 U. S. 589, 614. Cf. *Denver Joint Stock Land Bank v. Markham*, 107 Pac. 2d 313, 315 (1940), pointing out that under Colorado law "water rights may or may not be an appurtenance, and pass or not pass with a conveyance of land, depending upon the intention of the grantor." Petitioner apparently recognized this in stipulating that the title to the canals and reservoirs is in petitioner's corporation. Thus, even if it be assumed that the individual farmer owns the water rights, the irrigation company still may separately own the reservoirs and canals and be the employer of the workers engaged in maintaining them.



ers' interests in the water rights for purposes of State taxation or other local purposes (see Petition, pp. 29-34), the status of these employees under the Fair Labor Standards Act is not to be determined by "such varying local conceptions." *Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 123.

### CONCLUSION

The decision of the court below that the "agriculture" exemption is inapplicable to the employees of petitioner is correct. There is no conflict of decision. It is respectfully submitted, therefore, that the petition for a writ of certiorari be denied.

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July 1948.

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CIVIL RIGHTS DIVISION

Nos. 128 and 196

# In the Supreme Court of the United States

OCTOBER TERM, 1948

THE FARMERS RESERVOIR AND IRRIGATION COM-  
PANY, A CORPORATION, PETITIONER

WILLIAM R. McCOMB, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR

WILLIAM R. McCOMB, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR

THE FARMERS RESERVOIR AND IRRIGATION COM-  
PANY, A CORPORATION

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR

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# In the Supreme Court of the United States

OCTOBER TERM, 1948

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No. 128

THE FARMERS RESERVOIR AND IRRIGATION COM-  
PANY, A CORPORATION, PETITIONER

v.

WILLIAM R. McCOMB, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR

---

No. 196

WILLIAM R. McCOMB, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES  
DEPARTMENT OF LABOR

v.

THE FARMERS RESERVOIR AND IRRIGATION COM-  
PANY, A CORPORATION

---

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE TENTH CIRCUIT

---

BRIEF FOR THE ADMINISTRATOR

OPINIONS. BELOW

The opinion of the District Court (R. 99-106)  
and its findings of fact and conclusions of law  
(R. 107-121) are not reported. The majority and



dissenting opinions of the Court of Appeals for the Tenth Circuit (R. 127-137) are reported at 167 F. 2d 911.

#### JURISDICTION

The judgment of the Court of Appeals was entered on April 23, 1948 (R. 138). The Administrator's petition for rehearing was denied on May 25, 1948 (R. 146). The petition for certiorari was filed on June 28, 1948, and the Administrator's conditional cross-petition for certiorari was filed on August 4, 1948, and certiorari was granted on October 11, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

#### QUESTIONS PRESENTED

1. Whether the "agriculture" exemption provided in Section 13 (a) (6) of the Fair Labor Standards Act extends to ditch riders, reservoir tenders, canal maintenance men, and a city office employee, who perform no services on farms and are employed by an irrigation company which owns no farm lands and raises no crops but is an independent corporate entity engaged in supplying water to its farmer-stockholders.

2. Whether the clerical worker for an irrigation company, like its other employees, is engaged in a process or occupation necessary to the production of crops for interstate shipment carried on by the farmers served by the company.

3. Whether a bookkeeper-accountant is exempt from the wage and hour provisions of the Act as

an "employee employed in a bona fide \* \* \* administrative \* \* \* capacity (as such terms are defined and delimited by regulations of the Administrator)", in the absence of a showing in the record that he meets the requirements prescribed in the Administrator's regulations.

#### STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, 29 U. S. C. 201, *et seq.*, are as follows:

SEC. 3 (f). "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

SEC. 3 (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in

the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

\* \* \* \* \*

SEC. 7 (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

\* \* \* \* \*

(3) for a workweek longer than forty hours. \* \* \*

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

\* \* \* \* \*

SEC. 13 (a) The [minimum wage and overtime] provisions \* \* \* shall not apply with respect to (1) any employee employed in a bona fide \* \* \* administrative \* \* \* capacity \* \* \* (as such terms are defined and delimited by regulations of the Administrator); \* \* \* (6) any employee employed in agriculture;

\* \* \*

Section 541.2 of the Regulations of the Administrator, Wage and Hour Division, Department of Labor (7 F. R. 332; 29 C. F. R. Cum. Supp. Sec. 541.2), promulgated pursuant to Section 13

(a) (1) of the Fair Labor Standards Act, reads as follows:

The term "employee employed in a bona fide \* \* \* administrative \* \* \* capacity" in section 13 (a) (1) of the Act shall mean any employee—

(a) Who is compensated for his services on a salary or fee basis at a rate of not less than \$200 per month (exclusive of board, lodging, or other facilities), and

(b) (1) Who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in these regulations), where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment; or

(2) Who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or

(3) Whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment; or

(4) Who is engaged in transporting goods or passengers for hire and who



performs, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties require the exercise of discretion and independent judgment.

#### STATEMENT

The facts of this case have been stipulated and are not in dispute (R. 11-58). Petitioner, a Colorado corporation with its principal office and place of business in Denver, Colorado, owns, operates and maintains a system of irrigation canals and reservoirs for the purposes of diverting water from the public streams of Colorado, and of storing and transporting it to individual stockholders of the corporation for use in irrigating farm land (R. 107). The owners of dry grazing and unproductive lands organized the corporation for the purpose of operating an irrigation system to convert their lands into irrigated farm lands (R. 107-108). The corporation borrowed money by selling bonds to the public, which are now outstanding in the amount of \$450,000, and by other means, and planned, surveyed and constructed the irrigation system (R. 58, 107-108). This irrigation system extends through 300 to 400 miles of canals located in several counties of Colorado, includes four large and a number of small water storage reservoirs and is used to irrigate approximately 100,000 acres of farm land (R. 107-108, 109). Petitioner corporation owns no farm lands but has title to

the lands upon which the canals and reservoirs are located and, in some instances, is a joint owner with other irrigation companies of certain canals in its irrigation system (R. 108, 109). Certain of the canals have their headgates on South Platte River, Clear Creek, Boulder Creek or other public streams in Colorado from which water is diverted and then carried through the canal and reservoir system to the farmers' lateral ditches which extend from their farms to petitioner's canals (R. 108).

Petitioner's stockholders, for the most part, are farmers whose products are regularly shipped in substantial amounts in interstate commerce (R. 113-114). Each share of stock entitles the owner to a pro rata share of the available water supply of the irrigation system (R. 107-109). The funds necessary for maintaining and operating the irrigation system and for other corporate purposes are obtained by annual assessments upon the stockholders (R. 107), and also from lease rentals for duck hunting and similar purposes on some of its reservoirs, and from reimbursement by other irrigation companies for the operating expenses of certain jointly owned irrigation canals (R. 111-112).

The petitioner has four main classes of employees: (1) lake or reservoir tenders, (2) ditch riders, (3) maintenance men, and (4) employees in the Denver office of the company (R. 114). Water is delivered by the company's employees

from the storage reservoirs through the distributing and diversion headgates into the individual farmer's laterals (R. 110). None of the company's employees has anything to do with the application or use of the water after it is turned out of the company's canals into the individual laterals of the farmers (R. 110-111).

The ditch riders, lake tenders and maintenance men vary in number from sixteen to twenty-six (R. 116). The lake or reservoir tenders perform maintenance work upon the company's storage reservoirs and also operate the intakes and outlets of the reservoirs (R. 114). During the irrigation season, they release water from storage to fill the daily requirements of the stockholders (R. 114). In most instances, the lake or reservoir tenders also act as ditch riders and are charged with the maintenance of sections of the canals and the delivery of the water to the farmers (R. 114). Each of the company's ditch riders has a specified section of canals to control, generally varying in length from five to fifteen miles. From day to day during the irrigation season, the ditch rider receives requests for water along his section of the canal. If direct irrigation water is then being delivered, the ditch rider divides the water for distribution to the farmers. If storage water is being delivered, the ditch rider notifies the lake tender or superintendent of the company at the Denver office so that water may be turned out of the lake or reservoirs. The

ditch rider sets the headgate or weir on the company's canals to divert the required amount of water into the farmers' individual laterals. From this point the farmer has sole charge of the carriage of the water through his lateral and the application of the water to the land (R. 114-115).

In order to insure the uninterrupted flow of water through the company's irrigation system, the reservoir tenders and ditch riders also perform maintenance work on the company's irrigation system, including the dams, reservoirs, embankments, structures, and all stream diversion works. They keep the canals free from weeds, rubbish, and sand; they keep the diversion headgates and weirs to the farmers' laterals in good repair and operating order; they patrol the canals, reservoirs, and other appurtenant structures and attend to diverting the water from the natural streams and reservoirs; they conduct and run the water through and out of the canals and reservoirs (R. 115).

During the irrigation season, the ditch riders generally spend five to six hours a day in patrolling their respective sections of the company's canals, delivering the water to the laterals, and performing maintenance work on the canals. They generally spend two to three hours daily in preparing reports sent to the company's main office setting forth the amount of water which has been delivered to each farmer (R. 116). During the storage season, which covers the late



fall, winter, and early spring months, the company's employees are engaged in general repair and maintenance work necessary to the operation of the company's irrigation system and work approximately eight hours a day for six days a week (R. 115).

Petitioner's bookkeeper-accountant, Mr. Coler, is the only employee in the company's Denver office involved in the litigation. His duties include keeping petitioner's books, receipts, disbursement ledgers and account ledgers (R. 22-23). He also examines the daily work reports from each ditch rider or lake tender; he checks the daily work reports with the time sheets turned in by the ditch riders and lake tenders to see whether the time sheets are correct, and he apportions the total time shown by the time sheets among all of the different accounts against which the work is charged. In addition to preparing petitioner's annual financial statement, Mr. Coler prepares most of the records and reports required of petitioner by state and federal law. It was stipulated that all the work performed by Mr. Coler "is necessary in the conduct of defendant's business \* \* \*" and that "For the purposes of this case only, defendant does not contend that Mr. Coler is exempt under either the 'administrative' or 'executive' provisions of the Act \* \* \*."

The district court found that all the employees discussed above except the bookkeeper-accountant

were engaged in the production of goods for commerce, and that all of them including the bookkeeper-accountant worked more than the statutory number of hours without receiving overtime compensation, as required by the provisions of the Act (R. 116, 121). The court dismissed the complaint, however, on the ground that all the employees were exempt from the Act under Section 13 (a) (6) as employees "employed in agriculture" (R. 121). The Court of Appeals reversed, holding that the employees are engaged in a process or occupation necessary to the production of goods for commerce, "within the meaning of the Act," and that "employees of a company engaged in diverting water, storing water, and delivering water to farmers at their laterals for irrigating lands of the farmers, and in keeping the property of the company in operating condition, all separate and distinct from the farming operations of the farmers, are not engaged in agriculture within the intent and meaning of section 13 (a) (6)" (R. 133). It took note, however, of a contention, made for the first time in petitioner's brief on appeal, that its bookkeeper-accountant was exempt from the wage and hour provisions of the Act pursuant to its Section 13 (a) (1) as an "employee employed in a bona fide \* \* \* administrative \* \* \* capacity \* \* \* (as such terms are defined and delimited by regulations of the Administrator)." Based on statements not found in the

record, but appearing only in petitioner's brief in that court, that this employee's salary had been increased from \$190 to \$209 per month, and without discussing whether he met the requirements of the regulation with reference to duties, the Court of Appeals held that the complaint as to him had become moot (R. 133).

### SUMMARY OF ARGUMENT

#### I

Petitioner's employees are not engaged in "agriculture" as that term is defined in Section 3 (f) of the Act. The duties of employees engaged in maintaining canals and reservoirs owned and operated by an irrigation corporation and who perform no services on farms do not fall within the statutory categories "farming in all its branches", "the cultivation and tillage of the soil", and the "cultivation, growing, and harvesting" of agricultural commodities. The necessity for strict construction of exemptions from this Act (*Phillips Co. v. Walling*, 324 U. S. 490, 493) precludes application of these exemptive provisions to activities which, though necessary to farming, are performed off the farm for a corporation which itself owns no farms and raises no crops. *McComb v. Super-A Fertilizer Works, Inc.*, 165 F. 2d 824 (C. C. A. 1); *Meeker Cooperative Light & Power Assn. v. Phillips*, 158 F. 2d 698 (C. C. A. 8). The courts generally have not

regarded such work for irrigation corporations as employment in agriculture. *Walker v. Finney County Water Users Assn.*, 150 Kan. 254, 92 P. 2d 11. The special reasons for exempting persons employed in agriculture, which have been recognized in *Fleming v. Hawkeye Pearl Button Co.*, 113 F. 2d 52, 58 (C. C. A. 8) and *Bowie v. Gonzalez*, 117 F. 2d 11, 18 (C. C. A. 1) as applicable only to typical farm or agricultural workers, have no application to employees of a large commercially financed irrigation corporation who neither work nor live on farms and whose hours of work are not governed by seasonal characteristics. That Congress did not intend the exemption to include irrigation corporations is apparent from its debates on proposed amendments to the Act in 1946 (92 Cong. Rec. 2318), and its choice of specific language when it really intended to exempt them, as in the 1939 amendments to the Social Security Act. (53 Stat. 1360, 1377, 42 U. S. C. 409 (1) (3).)

## II

The provision in Section 3 (j) of the Act, that "an employee shall be deemed to have been engaged in the production of goods if such employee was employed in \* \* \* any process or occupation necessary to the production thereof" is applicable only to Sections 6 and 7 of the Act where the phrase "engaged \* \* \* in the production of goods" appears, and does



not apply to the word "production" as used in Section 3 (f) in conjunction with the words "cultivation, growing, and harvesting of any agricultural or horticultural commodities." The legislative history of the Act shows that the broad definition contained in Section 3 (j), which operates to extend the general coverage of the Act, was in the bills from the beginning; the word "production," however, was inserted in Section 3 (f) only on the eve of the adoption of the Act coincident with the enlargement of 3 (f) to include the production of gum spirits of turpentine and gum rosin, which the phrase "cultivation, growing, and harvesting" would not describe. H. Rept. 2738, 75th Cong., 3d Sess. Petitioner's contention that Section 3 (j) requires exemption under Section 3 (f) of any employee engaged in a process or occupation necessary to the production of agricultural commodities would make a large part of the definition mere surplusage, would extend it to wholly unintended fields such as the manufacture of farm implements, and violates settled principles of statutory construction. There is no inconsistency, therefore, in the construction of the court below that petitioner's employees come within the general coverage of the Act, but are not exempt as engaged in agriculture. *McComb v. Super-A Fertilizer Works, Inc.*, 165 F. 2d 824.

## III

Petitioner's employees are not engaged in "any practices \* \* \* performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." Petitioner is a corporation, not itself engaged in farming, organized under and existing by virtue of the laws of the State of Colorado (R. 11). Although its stockholders are principally farmers, its separate corporate entity cannot be disregarded in order to give it an exemption from this Act. *Boutell v. Walling*, 327 U. S. 463. As petitioner's employees do not work on any fields where crops are grown or livestock raised but perform their services on canals and reservoirs owned by petitioner corporation (R. 13) it is clear that they are not employed "on a farm". Petitioner's argument, based on the peculiarities of Colorado law, is in conflict with this Court's holding that "federal legislation, administered by a national agency, intended to solve a national problem on a national scale" is not subject to "such varying local conceptions, either statutory or judicial \* \* \*." *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111, 123. Petitioner's employees are not exempt under this portion of the definition for the additional reason that petitioner's operations are with reference to crops grown by others. Thus, they are not "incident to or in conjunction with such farming operations." [Italics supplied.] *Bowie v. Gonzales*, 117 F. 2d 11, 18 (C. C. A. 1).

## IV

Petitioner's bookkeeper-accountant, like its other employees, is engaged in the production of goods for commerce within the meaning of the Act. That the Act applies to office employees as well as other employees of an employer who performs a function necessary to production, as distinguished from directly engaging in production, is established by *Roland Electrical Co. v. Walling*, 326 U. S. 657.

## V

The decision below that petitioner's bookkeeper-accountant is exempt as an "employee employed in a bona fide \* \* \* administrative \* \* \* capacity \* \* \* (as such terms are defined and delimited by regulations of the Administrator)," should be reversed because his duties, as a typical bookkeeper, do not meet the requirements contained in Section 541.2 (b) of the regulations defining this capacity. (Title 29, Code of Federal Regulations, Part 541, 5 F. R. 4077). *Geo. Lawley & Son Corp. v. South*, 140 F. 2d 439 (C. C. A. 1), certiorari denied, 322 U. S. 746. The court below also erred in finding that the bookkeeper-accountant met the additional requirement of a \$200.00 per month salary contained in Section 541.2 (a) of the regulations. This ruling was based only on a statement in petitioner's brief in that court and is not supported by the record. The court

below should not have permitted this defense to be raised on appeal, in violation of the stipulation expressly waiving it, particularly in view of the fact that it was neither pleaded nor tried in the district court. In any event, the case as to this employee did not become moot by reason of the effect of any increase in his salary several months after the decision of the district court. "Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power." *Walling v. Helmerich & Payne*, 323 U. S. 37, 43.

#### ARGUMENT

#### I

PETITIONER'S EMPLOYEES ARE NOT ENGAGED IN "FARMING IN ALL ITS BRANCHES", "THE CULTIVATION AND TILLAGE OF THE SOIL," OR THE "CULTIVATION, GROWING, AND HARVESTING" OF AGRICULTURAL COMMODITIES WITHIN THE MEANING OF SECTION 3 (f) OF THE ACT

The decision of the court below that petitioner's employees were not employed in "agriculture" as that term is defined in Section 3 (f) is supported by the language and purposes of the exemption and the views expressed by both Congress and the courts with respect to the scope of agricultural employment. Petitioner argues that its employees who are engaged in maintaining its irrigation canals and reservoirs are included in the phrases "farming in all its branches,"



"the cultivation and tillage of the soil," and the "cultivation; growing, and harvesting" of agricultural commodities, all of which are contained in the statutory definition of agriculture. The difficulty with this argument, however, is that the employees do not physically engage in these activities, but rather in maintaining reservoirs and irrigation canals, the water from which is used by farmers in their agricultural activities.

It is the position of the Administrator that petitioner's employees are not "plainly and unmistakably within" the "terms and spirit" of the exemption involved here, and the exemption is inapplicable to their employment. *Phillips Co. v. Walling*, 324 U. S. 490, 493. This view is in accord with that taken by the Courts of Appeals for virtually all the circuits as to the necessity for strict construction of exemptions from the Fair Labor Standards Act.<sup>1</sup>

<sup>1</sup> *Consolidated Timber Co. v. Womack*, 132 F. 2d 101, 106 (C. C. A. 9); *Fleming v. Hawkeye Pearl Button Co.*, 413 F. 2d 52, 56 (C. C. A. 8); *Fleming v. Palmer*, 123 F. 2d 749, 762 (C. C. A. 1), certiorari denied, 316 U. S. 662; *Bowie v. Gonzalez*, 117 F. 2d 11, 16 (C. C. A. 1); *Walling v. Reid*, 139 F. 2d 323 (C. C. A. 8); *Helena Glendale Ferry Co. v. Walling*, 132 F. 2d 616 (C. C. A. 8); *West Kentucky Coal Co. v. Walling*, 153 F. 2d 582 (C. C. A. 6); *Fletcher v. Grinnell Bros.*, 150 F. 2d 337 (C. C. A. 6); *Walling v. Consumers Co.*, 149 F. 2d 626 (C. C. A. 7); *Anderson v. Manhattan Lighterage Corp.*, 148 F. 2d 971 (C. C. A. 2); *Walling v. Keansburg Steamship Co.*, 162 F. 2d 405 (C. C. A. 3). See also *Piedmont & Northern Ry. v. Interstate Commerce Comm.*, 286 U. S. 299, 311-312.

## A. THE LANGUAGE OF THE EXEMPTION

The definition of "agriculture" in Section 3 (f) clearly indicates that, except for specifically defined operations, it encompasses only ordinary farming activities themselves, and does not include other incidental activities unless they are "performed by a farmer or on a farm as an incident to or in conjunction with such [specifically enumerated in the earlier part of the definition] farming operations."<sup>2</sup> A careful analysis of the definition of "agriculture" compels the conclusion that petitioner's employees do not come within the terms of the definition.

It is clear from the stipulated facts and the findings of fact of the district court (R. 11-23, 107-121) that petitioner itself is not a farmer and is not engaged in farming. On the contrary, it owns no farms and raises no crops. It is merely a corporation owning, maintaining, and operating a system of irrigation canals and reservoirs by

<sup>2</sup> Section 3 (f) provides as follows: "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." [Emphasis supplied.]

means of which water is distributed to individual farmers who use the water to irrigate their lands (R. 107). Although such services are useful and in some cases essential to farmers, they can no more be considered as actual engagement in "the cultivation and tillage of the soil," the "cultivation, growing, and harvesting" of agricultural commodities, or a branch of "farming" than was the manufacture and delivery of fertilizer to farms for use by farmers (*McComb v. Super-A Fertilizer Works, Inc.*, 165 F. 2d 824 (C. C. A. 1)), or the supplying of electricity to farms for use in the operation of farm machinery (*Meeker Cooperative Light & Power Assn. v. Phillips*, 158 F. 2d 698 (C. C. A. 8)).

It is equally clear that petitioner's employees who are engaged in keeping petitioner's canals "free from weeds, rubbish and sand and in good repair" (R. 115), and who keep petitioner's reservoirs "in good repair and working order for the safe storage and flowage of water therefrom" (*id.*), are not themselves engaged in the "cultivation and tillage of the soil," or in the "cultivation, growing, and harvesting" of agricultural commodities. Petitioner's attempt to fit its activities within the terms of the statutory definition overlooks the distinction between engaging in the specifically enumerated activities and engaging in an activity which makes it possible (in this case for the farmer or his hired hand) to

perform the particular operation. We do not argue that the work of petitioner's employees is not helpful or necessary to the "cultivation and tillage of the soil" or the "cultivation, growing, and harvesting" of agricultural commodities. We do contend, however, that petitioner's employees do not engage in the enumerated activities, but rather are engaged in maintaining reservoirs and irrigation canals (owned by a non-farming corporate entity), the water from which is used by farmers in their agricultural activities;<sup>3</sup> and that the services performed by irrigation companies cannot, therefore, in themselves qualify as constituting the agricultural pursuits specifically enumerated in the statutory definition.

B. AGRICULTURAL ACTIVITIES AS VIEWED BY THE COURTS  
GENERALLY<sup>4</sup>

The courts and Congress have recognized that although irrigation work performed by a farmer

<sup>3</sup> The Supreme Court of Colorado has said that, "The word 'irrigation,' in its primary sense, is defined 'a sprinkling, or watering; \* \* \*'" and that the term was used by the Colorado legislators "as denoting the *application of water to lands* for the raising of agricultural crops and other products of the soil." [Italics supplied.] *Platte Water Co. v. Northern Colorado Irrigation Co.*, 12 Colo. 525, 529-30, 21 Pac. 711, 712. Petitioner's employees clearly do not "irrigate" the farmer's land according to this definition. See also *City and County of Denver v. Brown*, 56 Colo. 216, 138 Pac. 44, 49; *Paxton & Hershey Irrigation Canal & Land Co. v. Farmers' & Merchants' Irrigation & Land Co.*, 45 Neb. 884, 64 N. W. 343, 345.

<sup>4</sup> As Point I of the argument is restricted to the question of whether petitioner's employees are engaged in the agri-



or on a farm incidental to his farming operations may be within the ordinary concept of agriculture, irrigation work performed on the large scale here involved by a separate corporate entity through its employees, whose work never even brings them on the farms, is not agriculture. Most directly in point is the decision of the Kansas Supreme Court in *Walker v. Finney County Water Users Assn.*, 150 Kan. 254, 92 P. 2d 11. In that case an employee suffered an injury while operating a cement mixer in connection with some construction work on the diversion dam which was an essential part of the association's system. The respondent, like petitioner, an irrigation corporation whose stockholders were farmers, sought exemption from the State Workmen's Compensation Act, which exempted employees engaged in an agricultural pursuit. In rejecting this contention the court stated (150 Kan. at 255-256):

cultural activities specifically enumerated in Section 3 (f) (which are no broader than the general term "agriculture" as commonly understood), the cases cited herein dealing with the term agricultural labor as used in other statutes are pertinent. The breadth of Section 3 (f) in this Act, which petitioner cites in its brief, arises from that portion of the definition which exempts other practices "performed by a farmer or on a farm as an incident to or in conjunction with such farming operations." Whether the petitioner's employees are exempt under that portion of the definition is discussed in Point III of the Argument. These cases, decided under statutes not containing similarly broad language, are not pertinent to that Point of the argument.

Its [respondent's] function is to acquire water and through its system of canals and laterals to convey it to the lands of its stockholders where it is used for irrigation. It serves agriculture, but in the opinion of the court it is not agriculture. It is not an incident to agriculture; no more than the business of the manufacturer of farm implements would be an incident to agriculture. In fact, the business of the respondent is not an "incident" to anything. It is an institution in itself. No part of its business is to cultivate lands or to grow crops, or to raise livestock. The finding and opinion of the court is that the respondent is not exempt from the operation of the workmen's compensation act on the ground that it is an agricultural pursuit or an incident thereto.

Similarly, the United States District Court for the Western District of Texas in two recent

decisions held that the work of employees of irrigation companies was not "agricultural labor" under the Social Security Act.<sup>5</sup> *Lehrer v. Scofield*, No. 171, and *Barbers Hill Canal Co. v. Scofield*, No. 170, both decided August 19, 1947. In the only case under the Fair Labor Standards Act which involved an irrigation system quite similar to that of petitioner, the employees were held subject to the provisions of the Act and the agricultural exemption was not even claimed. *Reynolds v. Salt River Valley Water Users Assn.*, 143 F.2d 863 (C. C. A. 9), certiorari denied, 323 U. S. 764.

<sup>5</sup> These decisions related to the meaning of "agriculture" before the 1939 amendments to the Social Security Act, discussed, *infra*, pp. 31-32. The court was interpreting the term as defined in Treasury Regulations 90, promulgated under Title IX of the Social Security Act, as follows: Art. 206 (1). "Agricultural labor.—The term 'agricultural labor' includes all services performed—(a) By an employee, on a farm, in connection with the cultivation of the soil, the harvesting of crops, or the raising, feeding, or management of live stock, bees, and poultry; or (b) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation, or marketing of those materials or articles. Such services do not constitute 'agricultural labor,' however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and unless such processing, packing, packaging, transportation, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations. As used herein the term 'farm' embraces the farm in the ordinary accepted sense, and includes stock, dairy, poultry, fruit, and truck farms, plantations, ranges, and orchards. Forestry and lumbering are not included within the exception."

The decisions of the courts reflect their general attitude that exemptions from social legislation for "agricultural labor" are to be limited to agricultural activities in their basic sense and to related activities performed by farmers or on farms. Thus, in *H. Duys & Co. v. Tonic*, 125 Conn. 300, 5 A. 2d 23, 27, 28, the Supreme Court of Errors of Connecticut considered and analyzed a great number of cases and, after concluding that no general rule was available, defined a farm laborer as "one who labors upon a farm in raising crops or in doing general farm work". It also noted that "in all of the cases in which services rendered by employees of others than the farmer for whom they were performed have been held to be farm or agricultural laborers, those services have been rendered on the farm or in intimate connection with it."<sup>6</sup>

The scope of the agriculture exemption has not been and was not intended to be extended to activities which may be closely related or even essential to farming but which are not themselves "in agriculture." Although rural electric corporations, fertilizer manufacturers and farm equipment manufacturers are all engaged in activities directly connected with the raising of agricultural commodities, they are not regarded

<sup>6</sup> The holding of the case was that the processing and packing of tobacco at a warehouse operated as an independent business was not agriculture; although similar activities performed by farmers might be considered agriculture.



as engaged in agriculture. The non-agricultural nature of such work was recognized in *Meeker Cooperative Light & Power Assn. v. Phillips*, 158 F. 2d 698 (C. C. A. 8), in which employees of two electric cooperatives whose customers were largely farmers were held not "employed in agriculture" within the meaning of Section 13 (a) (6) of the Act. Similarly in *McComb v. Super-A Fertilizer Works, Inc.*, 165 F. 2d 824 (C. C. A. 1), employees of a fertilizer company who mixed, bagged, and delivered fertilizer to farms were denied the agricultural exemption. The work performed by the electric companies' maintenance and office employees and that performed by the fertilizer company's employees are functionally analogous to that performed by petitioner's maintenance employees, ditch riders, lake tenders, laborers, and bookkeeper. Neither of these groups of employees, however, are employed by farmers or work on farms. Their work does not require them to possess any agricultural skills or experience.

The importance of the nature of the work performed by the employees, notwithstanding its admitted relation to an agricultural enterprise, is well illustrated by *Jones v. Gaylord Guernsey Farms*, 128 F. 2d 1008 (C. C. A. 10), which involved the meaning of "agricultural labor" under the Social Security Act. The taxpayer there owned and operated a dairy farm which yielded approximately 300 gallons of milk per day. Part

of the milk was bottled on the farm and part was processed on the farm into cream, cheese, and buttermilk. The question was whether the services performed by various employees, including a bookkeeper and stenographer, were "agricultural labor" under the Social Security Act. The court held that the taxpayer was a farmer and that the bottlers and coolers (who lived on the farm), the carpenters (who performed their work on the farm), the showmen (whose work, except when at a fair, was done on the farm), and the truck drivers (who picked up the loaded trucks at the farm each morning), were "agricultural labor" within the meaning of the Social Security Act. The stenographer and the bookkeeper, however, although employed by a farmer, were held not to be "agricultural labor." The employees in the instant case whose work is not performed on a farm and who are not required to possess any agricultural skill or experience, are no more "agricultural labor" than the bookkeeper and stenographer in the *Gaylord* case.

These decisions also show that in many situations an employment which might be deemed agricultural when the employee is engaged by a farmer to perform services incidental to his own agricultural pursuits will not be so considered when he is engaged to perform particular services for many farmers or for farmers and others. A lucid discussion of the factors which may be determinative of the question whether an employ-

ment is agricultural in character appears in *Peterson v. Farmers State Bank*, 180 Minn. 40, 230 N. W. 124, where the court in passing upon the applicability of a workmen's compensation statute observed (pp. 41-42):

A workman is not a farm laborer simply because at the moment he is doing work on a farm; nor because the task on which he is engaged happens to be what is ordinarily considered farm labor. The employe of an implement dealer does not become a farm laborer while engaged in correcting the behavior of a self-binder in the grain field of the owner, a farmer and customer of the dealer. Nor would the employe of a well digger become a farm laborer while stabling horses used on the drilling outfit. But a farmer's hired man would not cease to be a farm laborer while adjusting harvesting machinery or stabling the horses of a contractor drilling a well on the place. The modern farm laborer doubtless does much work on the rapidly increasing electrical equipment on farms. He continues a farm laborer while he does it. But an electrician sent out from town to do the same thing would not become a farm laborer for the occasion. So also a farm laborer does not step out of his own part while doing carpenter work for his farmer employer in the repair of farm buildings. Neither does the carpenter who comes onto the farm for the job of carpentry and nothing more. One continues a farm laborer and the other does not become one.

\* \* \* Neither the pending task nor the place where it is being performed is the test. The whole character of the employment must be looked to to determine whether he is a farm laborer. That is what is meant by the statement that it is "the character of the work which the employee is hired to perform which is the test of whether the employee is a farm laborer."

#### C. THE PURPOSES OF THE EXEMPTION

Although the intent to provide an exemption only for customary farm activities seems clear from the language of the definition (Section 3 (f)), this fact is also evident from the legislative history of the exemption for agricultural employees. The practical difficulties of regulating the hours and wages of farm labor, because of the seasonal nature of work on the farm with peak loads over short periods and other special problems characteristic of farm work, supplied a prime motivating factor in providing the exemption. See 82 Cong. Rec. 1476. The special reasons for exempting agricultural employees have also been recognized by the courts. In *Fleming v. Hawkeye Pearl Button Co.*, 113 F. 2d 52, 58 (C. C. A. 8), the court observed that a reason for the exemption was that "it was not considered feasible to regulate wages paid agricultural laborers. \* \* \*

Any attempt to regulate farm wages would seem to present a difficult question because the farm laborer generally does and must of necessity re-



ceive a substantial part of his income in board, room and laundry." Similarly, in *Bowie v. Gonzalez*, 117 F. 2d 11, 18 (C. C. A. 1), the court recognized that "any attempt to regulate agricultural wages would present a difficult problem since a substantial part of the agricultural workers' income must of necessity be for board and room."

These reasons apply only to typical farm employees. They have no relation to employees of petitioner, a large commercially financed irrigation company operating out of the City of Denver, which was established under independent management to harness rivers and streams and supply water to 100,000 acres of farm land along hundreds of miles of canals which must be maintained throughout the year. Unlike employees on a farm, these employees, as found by the district court, work eight hours a day, six days a week during the storage season and from seven to nine hours a day for seven days a week during the irrigation season (R. 116). Their work does not have the seasonal characteristics of the farm labor nor its irregularity in hours of work. Petitioner itself is not a farmer and admittedly operates no farms. The employees do not live or work on farms and are not subject to conditions of employment analogous to those of farm workers. Obviously, therefore, none of the reasons underlying the granting of an exemption for agricultural labor from the Act is applicable to petitioner's employees.

whose employment, rather than being agricultural in nature, has all the characteristics of industrial employment.

D. CONGRESSIONAL UNDERSTANDING OF "AGRICULTURE" AS NOT INCLUDING IRRIGATION COMPANIES

The decisions discussed above are in accord with the views of Congress that a general exemption for agricultural activities does not encompass services performed by an irrigation company which are not performed on the farm. Thus in 1939, when Congress wanted to exclude irrigation functions from the Social Security Act, it did so by specifically enlarging the exemption for agriculture to embrace them.<sup>7</sup> Congress recognized, as shown by the reports of the House Committee on Ways and Means and the Senate Committee on Finance, that the effect of so defining "agricultural labor" was "to extend the meaning" of the term and that, under the new definition, the term was "broadened to include as 'agricultural labor' certain services not at present exempt." H. Rept. No. 728, 76th Cong., 1st Sess., pp. 2, 51-52; S. Rept. No. 734, 76th Cong., 1st Sess., pp. 2, 19, 61-62. The definition of agriculture in the Fair Labor Standards Act is comparable to the Treasury Reg-

<sup>7</sup> The 1939 amendment defined "agricultural labor" to include "all services performed \* \* \* in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways used exclusively for supplying and storing water for farming purposes. 53 Stat. 1373, 42 U. S. C. § 409 (1) (3).

ulations under the Social Security Act before the 1939 amendments, which Congress recognized did not extend to irrigation companies. It is significant that although Congress amended the Fair Labor Standards Act in 1939 and 1940, the definition of agriculture was not modified to include irrigation companies.

Further evidence of the Congressional concept of agriculture may be gleaned from the Senate's consideration in 1946 of S. 1349, a bill which provided for numerous changes to the Fair Labor Standards Act. The definition of agriculture was not changed, however, and the question whether it applied to employees engaged in irrigation was a subject of discussion on the floor of the Senate. The debates on the point indicate that the Senators were of the same mind as the Administrator in recognizing that irrigation work performed on a farm by a farmer in connection with his own farming operations could properly be considered agriculture, but that the operation of large-scale irrigation projects undertaken as separate enterprises, even though intended for agricultural purposes, was not agriculture. Thus Senator Taft stated (92 Cong. Rec. 2318):

The only exemption is with regard to a worker who is employed in agriculture. I would not think that the operators of an irrigation project would be employed in

agriculture, so I would not think they would be exempt.

\* \* \* \* \*

Why is the employee of an irrigation company employed in agriculture any more than are employees of an electric company which supplies electricity to a farm? It is a service industry to the farm. The man involved is not engaged in agriculture.

In response to a question put by Senator McCarran as to the status of irrigators employed by farmers on western farm lands \* Senators Pepper, Taft, and Aiken agreed upon the distinction that must be drawn between irrigation work performed by a farmer or his employees on a farm and that performed by an irrigation company. The colloquy follows (92 Cong. Rec. 2318):

MR. PEPPER. \* \* \* I think that the men to whom the Senator has referred are engaged in agriculture when they work in the fields. Their situation is not like that of an electric light company in a nearby village which furnishes electric current to a farm. The men who are employed in an electric light company are not engaged in agriculture. But as to a man who is required to work in the field in cultivating

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\* Senator McCarran's questions were limited to employees of farmers, "the man who works in the field applying water to the land. \* \* \* the man who plants and irrigates grain," and were not addressed to employees of an independently operated irrigation company who do not enter on the land where the crops are grown.



agricultural crops, I do not believe there can be any question.

Mr. TAFT. I agree with the Senator from Florida.

Mr. AIKEN. It is my information that an irrigation company is already covered under the present law. But, of course, the ditching of the fields by the farmer himself—I assume that he ditches his own fields after he gets the water—would be agriculture. At the present time an irrigation company is covered under the law just as is an electric-light company.

These debates assume significance in view of the Congressional decision the following year in the National Labor Relations Board Appropriations Act of 1948 to direct the Board in determining the scope of the exemption for "agricultural labor" under the National Labor Relations Act to be guided by Section 3 (f) of the Fair Labor Standards Act.<sup>9</sup> Thus, Congress in effect re-enacted a definition of agriculture which it understood excluded irrigation companies, although it might have included them by using the amended definition in the Social Security Act as a guide.<sup>10</sup>

<sup>9</sup> Pub. No. 165, 80th Cong., 1st Sess. (July 8, 1947), Title III.

<sup>10</sup> *Big Wood Canal Co. v. Unemployment Comp. Division*, 61 Idaho 247, 100 P. 2d 49, cited by petitioner, which held employees of an irrigation company to be engaged in agricultural labor, misconstrued the effect of the 1939 amendments to the Social Security Act (see *Chester Fosgate Co. v. United States*, 125 F. 2d 775 (C. C. A. 5) and applied a test under which agricultural labor would embrace employees of

In summary, therefore, the literal language of the exemption, the decisions of the courts generally, the purposes of the exemption, and the discussions in Congress combine to show that, however necessary to agriculture, petitioner's employees do not come within the statutory exemptions of "farming in all its branches", "the cultivation and tillage of the soil," and the "cultivation, growing, and harvesting" of agricultural commodities.

## II

PETITIONER'S EMPLOYEES ARE NOT ENGAGED IN THE "PRODUCTION \* \* \* OF ANY AGRICULTURAL OR HORTICULTURAL COMMODITIES" WITHIN THE MEANING OF SECTION 3 (f) OF THE ACT

Petitioner makes the further contention that employees "necessary to" agricultural production are engaged in agriculture, arguing that the phrase "production \* \* \* of any agricultural or horticultural commodities" in the definition of "agriculture," should be given the same scope as the phrase "production of goods" in Section 3 (j). This contention poses the central problem of this case, since acceptance of petitioner's view here would mean that all its employees, including the bookkeeper-accountant in the Denver office (as well as the employees of other concerns producing goods for use by farmers) are exempt as employees engaged in agriculture.

agricultural implement manufacturers, fertilizer companies, companies furnishing electrical energy to farmers, and other industrial concerns.

It is our position that Congress did not intend that "production of goods" in Section 3 (j), which is defined as including "any process or occupation necessary to the production thereof" should be applicable to the phrase "production, cultivation, growing, and harvesting of agricultural \* \* \* commodities." We believe that an analysis of the Act clearly demonstrates that the Section 3 (j) definition refers to the coverage provisions of the Act (the minimum wage, overtime, and child labor provisions), and was not designed or intended to apply to the word "production" as used in the agricultural exemption provision. This view is supported by the legislative history of the two sections in question as well as by the decisions of the courts construing these sections and other sections of the Act.

It should be noted at the outset that Section 3 (j) does not define the word "production" as such. It defines "produced", and then refers to production only as a part of the phrase "production of goods," which is the phrase used in Sections 6 and 7 (a) to describe employees covered by the Act.<sup>1</sup> The phrase "pro-

<sup>1</sup> Section 3 (j) provides as follows: "Produced" means produced, manufactured, mined, handled, or in any other manner worked or in any State; and for the purpose of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State."

duction of goods" in Section 3 (j) thus was concerned with the identical phrase in Sections 6 and 7 (a), and not to the single word "production" as used in Sections 3 (f), 7 (c), 9 and 13 (a) (10). On the contrary, the word "production" in Section 3 (f) was clearly intended to refer to activities of the same sort as are covered by the words "cultivation, growing, and harvesting" with which it is associated.

The word "production," of course, is a word of "different shades of meaning" (cf. *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 433)—viz., production of machinery in the sense of manufacturing, production of coal in the sense of mining, production of crops in the sense of raising or growing, production of documents in the sense of presenting, exhibiting or giving access to. Not only does the specific legislative history show that the word as used in the definition of "agriculture" was not intended in the broad sense of the Section 3 (j) definition, but the statute as a whole demonstrates that it would lead to ridiculous results to accept petitioner's contention that the Section 3 (j) definition must necessarily be held applicable to the word "production" wherever that word is used in the Act.<sup>12</sup>

<sup>12</sup> That the same word "may have different meanings in different parts of the same act" is shown by *Atlantic Cleaners & Dyers v. United States*, 286 U. S. 427, 433; *Piedmont & Northern Ry. Co. v. Commissioner*, 286 U. S. 299, 312; *Lamar v. United States*, 240 U. S. 60, 65; *American Security Co. v.*



The legislative history discloses that the definition of "agriculture" did not contain the word "production" throughout the long debates on the bill, whereas the definition of "produced" was included in the original bills in substantially the same broad terms as finally enacted, and was, therefore, obviously drafted without any reference to or consideration of the exemption for agricultural employes. Section 3 (j) refers to the "production of goods," the phrase used in Sections 6 and 7 to describe those covered by the minimum wage and overtime provisions of the Act. The phrase "production of goods" was used in the original bills S. 2475 and H. R. 7200 (introduced on May 24, 1937) in the definition of the term "produced" and is found in each House Committee Print, Senate Report, Subcommittee Print, House Report, and Conference Committee Print from which the Fair Labor Standards Act finally emerged and was approved on June 25, 1938. Although agricultural labor was exempt from the provisions of the bill throughout all its versions beginning with S. 2475 and H. R. 7200 (introduced May 24, 1937), and the term "agriculture" was defined in S. 2475 as early as July 6, 1937 (Confidential Committee Print No. 1), the word "production" did not appear in the definition of agriculture until Confidential Conference Committee Print of June 10, 1938.

*District of Columbia*, 224 U. S. 491, 494 ("But it needs no authority to show that the same phrase may have different meanings in different connections.").

As passed by the House on May 24, 1938, the definition referred only to the "cultivation, growing, and harvesting of any agricultural or horticultural commodities" (S. 2475, May 25, 1938). The word "production" was inserted by the Conference Committee on the eve of the enactment of the Act in connection with the insertion of the parenthetical phrase "(including commodities defined as agricultural commodities in Section 15 (g) of the Agricultural Marketing Act, as amended.)" [46 Stat. 1550, 12 U. S. C. 1141 j (g).] That the word "production" was thus inserted only with reference to Section 15 (g) of the Agricultural Marketing Act is confirmed by the Conference Report (H. Rept. 2738, 75th Cong., 3rd Sess.), which in explaining the definition of "agriculture" uses the word "production" only with reference to the Agricultural Marketing Act. The report states (p. 29):

"Agriculture" is defined in the same way as in the House amendment with the following exceptions: (1) The *production* of commodities defined as agricultural commodities in Section 15 (g) of the Agricultural Marketing Act is included \* \* \* [Italics supplied.]

Section 15 (g) of the Agricultural Marketing Act refers in particular to "crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived:

Gum spirits of turpentine, and gum rosin  
 \* \* \*

As pointed out in *Bowie v. Gonzalez*, 117 F. 2d 11, 17 (C. C. A. 1), "the word 'production' is used in conjunction with the words 'cultivation, growing, and harvesting' \* \* \*". Inasmuch as court decisions had raised substantial doubt that the words "cultivation, growing, and harvesting" were appropriately descriptive of the oleoresin and turpentine processes,<sup>13</sup> the word "production" was inserted simply as the appropriate term, comparable to "cultivation, growing and harvesting" of other commodities and not with the intent to incorporate the all-inclusive definition of "produced" in Section 3 (j). Thus, this appears to be a clear case where "there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." See *Atlantic Cleaners and Dyers v. United States*, 286 U. S. 427, 433.

The contention advanced here and in the court below by petitioner that the word "production" in Section 3 (f) has the same scope given the

<sup>13</sup> *Union Naval Stores v. United States*, 240 U. S. 284, 289: " \* \* \* extracting turpentine \* \* \* cannot be regarded as cultivation within the meaning of the [homestead] act." *United States v. Waters-Pierce Oil Co.*, 196 Fed. 767, 770 (C. C. A. 8); "Cultivation, as an agricultural term, is not properly applicable to the process of extracting turpentine sap."

word "produced" in Section 3 (j) was also made to the Court of Appeals for the First Circuit in *McComb v. Super-A Fertilizer Works, Inc.*, 165 F. 2d 824. In the *Super-A* case, the court held that employees engaged in mixing and bagging fertilizer and delivering it to farms where it is used in the growing of sugarcane from which sugar and molasses are manufactured and shipped in interstate commerce, "were employed in an operation necessary for the production of goods for commerce" (165 F. 2d at 828) and were not employed in agriculture as defined by Section 3 (f) of the Act. In specifically rejecting the same contention as is advanced here by petitioner, the court stated (165 F. 2d at 828):

But we do not think that "production" was used § 3 (f) in its technical sense. If it were, it would render the use of the words, "cultivation, growing, and harvesting" mere surplusage, since the word "produced" as defined in § 3 (j) would include them. The legislative history of the introduction of the word "production" into § 3 (f) indicates that "production" was inserted to extend the exemption to additional agricultural activities, such as the extraction of resin, which might not be included by use of words like cultivation, or growing. See H. R. Rep. No. 2738, 75th Cong., 3rd Sess. 29.

The unsoundness of petitioner's contention is further confirmed by the clearly unintended re-



suits to which it would lead. This Court has held that statutory language should not be construed to include a case "believed not to be within the aim of Congress" even though the case be "indisputably \* \* \* within its literal meaning." *American Security Company v. District of Columbia*, 224 U. S. 491, 495. See also *Holy Trinity Church v. United States*, 143 U. S. 457; *McKee v. United States*, 164 U. S. 287, 293; *Markham v. Cabell*, 326 U. S. 404, 409; *United States v. American Trucking Assns.*, 310 U. S. 534, 543; *Walling v. Connecticut Co.*, 154 F. 2d 552, 553 (C. C. A. 2). In the last cited case, which related to an exemption provision in the Fair Labor Standards Act, the court held that, despite the correctness of the defendant's contention that an exemption literally applied to it, "the policy of the Act, disclosed in its history, precludes the acceptance of such a literal construction."

In giving the term "production" in the definition of agriculture the same scope that is given the phrase "production of goods," petitioner would not only render much of the definition of agriculture pure surplusage,<sup>14</sup> but would also ex-

<sup>14</sup> To assert, as petitioner does here, that the term "production" in the definition of agriculture includes all processes or occupations necessary to production is to argue that much of the definition of agriculture, and particularly the phrase "cultivation, growing, and harvesting," is mere surplusage. Even if it were less clear that the word "production" was there used to refer to the extraction of turpentine and rosin, it would be inappropriate to attribute to Congress the use of surplus language and redundant terminology. *Ex Parte*

pañd the definition to include many manufacturing activities plainly outside the contemplation of the exemption. Farm implements, such as tractors and plows, are "necessary to" the production of agricultural commodities, but it cannot be seriously urged that Congress intended to exempt as persons employed in "agriculture" those engaged in manufacturing such farm implements. Similarly, electric power is "necessary to" the operation of certain farm machinery, but it does not follow that persons engaged in furnishing such power to the farmer are engaged in agriculture. See *Meeker Cooperative Light & Power Assn. v. Phillips*, 158 F. 2d 698 (C. C. A. 8). Also, fertilizer is "necessary to" the increase in the yield of a fertilized field over one not so treated, but it does not follow that persons engaged in manufacturing fertilizer are "employed in agriculture." See *McComb v. Super-A-Fertilizer Works*, 165 F. 2d 824 (C. C. A. 1). And Congress has rejected an amendment which would have exempted industries such as the feed and fertilizer industries, the employees of which are engaged in work "necessary to" agricultural production, 83 Cong. Rec. 7421-7423.

*Public National Bank of New York*, 278 U. S. 101, 104. Particularly is this true where, as here, the elaborate statutory definition was evolved after months of extensive consideration and lengthy debate, and the term now in question was added at the last minute by the Conference Committee without debate on the floor of either house.

Further conclusive evidence that Congress did not use the word "production" in the same sense throughout the Act may be found in Section 9, which refers to the "production" of documents, and Sections 13 (a) (10) and 7 (c), which refer to the area of "production." Plainly the word "production" in those sections does not include "any process or occupation necessary to" production. If the Section 3 (j) definition were applied to Sections 13 (a) (10) and 7 (c), which provide an exemption to those employees employed in the named processes "within the area of production," these exemptions would be almost boundless. They would exempt not only those employed in the prescribed activities in the limited area where the various agricultural or horticultural commodities are grown, raised, or harvested but also to employees engaged in the designated activities in any area where any "process or occupation necessary to the production" of the agricultural commodities was performed.

### III

PETITIONER'S EMPLOYEES ARE NOT ENGAGED IN "ANY PRACTICES \* \* \* PERFORMED BY A FARMER OR ON A FARM AS AN INCIDENT TO OR IN CONJUNCTION WITH SUCH FARMING OPERATIONS" WITHIN THE MEANING OF SECTION 3 (f) OF THE ACT

Section 3 (f) defines "agriculture" to include "any practices \* \* \* performed by a farmer

or on a farm as an incident to or in conjunction with such farming operations." It is clear from its language that this portion of the statutory definition of "agriculture," which is the part which makes it quite broad in many of its applications, does not apply unless the employees are employed "by a farmer" or their work is performed "on a farm." Even if one of these alternative requirements is met, the practices must be "incident to or in conjunction with such farming operations." It is our position that this portion of the definition is inapplicable because petitioner is not a farmer; its operations do not take place on a farm; and its operations are not "incident to or in conjunction with such farming operations."

#### A. PETITIONER IS NOT A FARMER

Petitioner's contention that its employees are in fact employed not by an independent corporate entity but by the independent farmers who are its stockholders, is wholly untenable, both as a matter of fact and as a matter of law. Petitioner purports to rely upon the trial court's findings (R. 120) that the employees are "in truth and in fact, through and by reason of the agency of the defendant for its stockholders, for all intents and purposes employees of the farmer stockholders of the defendant." To the extent that this finding is construed to mean that petitioner's employees are employed by the individual



farmers and not by the corporate entity, it is directly contradicted by the stipulated facts. Contrary to petitioner's contention that it is not a separate<sup>s</sup> entity, the first paragraph of the "Stipulation and Agreement as to Certain Facts." states that petitioner is "a corporation organized and existing under and by virtue of the laws of the State of Colorado" (R. 11). The Articles of Incorporation and the By-Laws are included in the Stipulation. They establish that petitioner is a separate legal corporate entity operating, as do many other corporations, through its officers who are appointed by a board of directors elected by the stockholders (R. 25-40). The "finding of fact" that petitioner's employees are in effect employed by the farmer stockholders is specifically contradicted by Section 5 of the By-Laws, which reads as follows (R. 35):

All headgates in the Company's canals shall be operated and maintained by and under the exclusive control of this company and no stockholder or any other person shall have the right to interfere with, reconstruct, repair, change, or alter, open or close said headgates or any of them in any manner whatsoever.<sup>15</sup>

<sup>15</sup> If the court's finding can be considered as anything more than a legal conclusion, it is clear that it is no more than an inference drawn from the documentary evidence and stipulated facts, and, therefore, not binding upon the appellate court. It is fundamental that "the conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based." *Baumgartner v. United States*, 322

Thus, the stipulated facts as well as the facts of incorporation suffice to establish that petitioners' employees are not employees of the individual farmer stockholders, but are employees of the independent corporate entity.

This Court's decision in the case of *Boutell v. Walling*, 327 U. S. 463, construing another exception provision of this same Act, establishes that the corporate entity an employer has adopted for its own purposes cannot be disregarded in order to give it the benefit of an exemption from the Act—even though the employees would be exempt if no separate entity existed. In *Boutell v. Walling* four partners formed a company which engaged exclusively in maintaining and repairing automobiles and transportation equipment used by a separately incorporated motor carrier. The sole stockholders of the carrier corporation

U. S. 665, 670-671; and see *United States v. U. S. Gypsum Co.*, 333 U. S. 364, 394-395. Inferences or conclusions drawn by the trial court from stipulated facts, testimony which has not been personally heard, or undisputed evidence, do not preclude the reviewing court from drawing other inferences also permissible from such evidence. *Equitable Life Assur. Soc. v. Irelan*, 123 F. (2d) 462, 464 (C. C. A. 9); *Pfeifer Oil Transp. Co. v. The Ira S. Bushey*, 129 F. (2d) 606, 607 (C. C. A. 2); *Sun Insurance Office Ltd. v. Be-Mac Transport Co.*, 132 F. (2d) 535, 536 (C. C. A. 8); *Carter Oil Co. v. McQuigg*, 112 F. (2d) 275, 279 (C. C. A. 7); see also *Walling v. Rutherford Food Corporation*, 156 F. (2d) 513 (C. C. A. 10), affirmed 331 U. S. 722. For an extensive treatment of this subject, see Stern, *Review of Findings of Administrators, Judges & Juries: A Comparative Analysis*, 58 Harvard Law Review 70, 112-122.

were the same four partners engaged in the repair work. The transportation corporation was admittedly a motor carrier within the scope of the exemption provided in Section 13 (b) (1) of the Fair Labor Standards Act. Admittedly also, the mechanics repairing the vehicles would have been within the exemption had they been directly employed by the carrier corporation. But this Court held that the mechanics and other employees of the partnership could not be held within the exemption because they were employees of a separate legal entity. See also *Schenley Distillers Corp. v. United States*, 326 U. S. 432, relied upon in the *Boutell* case. In the *Schenley* case, this Court held that one who has chosen "a corporate arrangement, \* \* \* as a means of carrying out his business purposes, does not have the choice of disregarding the corporate entity in order to avoid [statutory] obligations \* \* \*" (at 437), which might not apply in the absence of the corporate arrangement. And see *Gray v. Powell*, 314 U. S. 402, 414, and cases there cited. A similar conclusion was reached by the Court of Appeals for the Ninth Circuit in the case of *North Whittier Heights Citrus Assn. v. National Labor Relations Board*, 109 F. (2d) 76, specifically with respect to a farmer's cooperative. In words directly applicable here, the court said (p. 80):

Petitioner argues that if each member of the non-profit cooperative corporation

that runs the packing house were to personally hire and direct those doing his own packing and sorting, the work would be agricultural and his employees would be agricultural laborers; that it follows, therefore, that in the case of the same members acting under a single organization to accomplish the same result there can be no change in the nature of the work nor in the status of the persons doing it. The conclusion does not follow. The factual change in the manner of accomplishing the same work is exactly what does change the status of those doing it. \* \* \*

There are many instances related in the authorities showing that work done in one way is agricultural labor and workmen doing the same nature of work but under different circumstances are not agricultural laborers, and vice versa.

Petitioner's contention that the non-profit character of the corporation entitles it to the exception is fully answered by the decisions that non-profit cooperatives composed largely of and serving farmers are not within the agricultural exemption. The result is the same whether the separate business entity is wholly independent of the farmers it serves or whether it is a corporation or cooperative with the farmers constituting the stockholders or members. *North Whittier Heights Citrus Assn. v. National Labor Relations Board*, 109 F. (2d) 76 (C. C. A. 9); *Meeker Cooperative Light & Power Assn. v.*



*Phillips*, 158 F. (2d) 698 (C. C. A. 8); *Lake Region Packing Assn. v. United States*, 146 F. (2d) 157, 159 (C. C. A. 5); *Walling v. McCracken Peach Growers Assn.*, 50 F. Supp. 900 (W. D. Ky.); *Redlands Foothill Groves v. Jacobs*, 30 F. Supp. 995 (S. D. Calif.). The *Lake Region Packing* case involved a non-profit marketing corporation, some of whose employees were engaged in packing and marketing the fruit grown by the farmer members of the cooperative. In holding that the employees were not "agricultural labor" under the Social Security Act, the Court of Appeals for the Fifth Circuit stated (p. 159): "it is quite clear that here is a case not of packing, processing and marketing as incidental to ordinary farming operations, but one, the essence of which was a commercial operation." The *McCracken* and *Redlands* cases also involved cooperative packing associations. In the *Meeker Cooperative* case, as previously indicated, the agricultural exemption was denied although it involved rural electrification cooperatives composed largely of farmer members who used the electrical energy in their farm operations. / The fact that the stockholders of petitioner are farmers, therefore, does not extend the agricultural exemptions to the employees of the independently operated irrigation company.

The decisions are in accord with the interpretative bulletin on farmers' cooperatives issued by the Administrator shortly after the enactment

of the Act (Interpretative Bulletin No. 10).<sup>10</sup> As there points out, "Statutes usually exempt farmers' cooperative associations in express terms if an exemption is intended. The omission of an express exemption from the Fair Labor Standards Act is significant since many unsuccessful attempts were made on the floor of Congress to secure special treatment for such cooperatives." See 81 Cong. Rec. 7927, 7928; 82 *id.* 1776, 1784.

**B. PETITIONER'S EMPLOYEES DO NOT WORK "ON A FARM"**

Petitioner's further contention, that the employees working on the canals and reservoirs are employed "on a farm" within the meaning of the exemption because under Colorado law the canals and reservoirs are appurtenant to and constitute a part of the farmer-stockholders' lands, is likewise untenable. It is stipulated that title to the canals and reservoirs is in the petitioner company (R. 13).

Petitioner relies upon a number of Colorado decisions holding that water or reservoir rights are taxable as improvements upon the lands to which they are applied, not as part of the reservoir and canal system (Pet. Br. pp. 31-34). This Court has recognized that the property rights in water may be "separate and distinct from the property

<sup>10</sup> Interpretative Bulletin No. 10 was originally issued in March 1939, and was published at 2 Wage Hour Rept. 179. It was reissued in September 1947 and published in the Federal Register, Ti. 29, ch. V, 12 F. R. 5961. For convenience, the bulletin is included as an Appendix to this brief.

right in the reservoirs, ditches or canals." See *Nebraska v. Wyoming*, 325 U. S. 589, 614. Cf. *Denver Joint Stock Land Bank v. Markham*, 107 Pac. (2d) 313, 315 (Colo. 1940), pointing out that under Colorado law "water rights may or may not be an appurtenance, and pass or not pass with a conveyance of land, depending upon the intention of the grantor." It follows that even if it be assumed that the individual farmer owns the water rights, the irrigation company still may separately own the reservoirs and canals.

In any event, the technical details of property rights are not controlling in deciding what is a "farm" within the meaning of a general Federal statute, particularly a statute whose express purpose is the establishment of uniform national standards. See *Brooklyn Savings Bank v. O'Neil*, 324 U. S. 697, 710 (pointing out "the Congressional policy of uniformity in the application of the provisions of the [Fair Labor Standards] Act"). See also *National Labor Relations Board v. Hearst Publications*, 322 U. S. 111. The *Hearst* case dealt with a contention quite similar to that advanced by petitioner here. It was there urged that the State laws should be given weight in determining who are employees within the meaning of the National Labor Relations Act. This Court held that Congress in enacting "federal legislation, administered by a national agency, intended to solve a national problem on a national scale" (*id.* at 123)

did not intend "to import this mass of technicality as a controlling 'standard' for uniform national application" (*id.* at 125-126). In language equally applicable here, the Court stated further (*id.* at 123):

It is an Act, therefore, in reference to which it is not only proper but necessary for us to assume, "in the absence of a plain indication of the contrary, that Congress \* \* \* is not making the application of the federal act dependent on state law." *Jerome v. United States*, 318 U. S. 101, 104. Nothing in the statute's background, history, terms or purposes indicates its scope is to be limited by such varying local conceptions, either statutory or judicial, or that it is to be administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems.

Similarly, here, the concept of employment "on a farm" in the Fair Labor Standards Act is not to be determined by "varying local conceptions, either statutory or judicial" (*Hearst* case, at 123).

The functional relationship of petitioner's reservoirs and canals to the farms they serve is the same as the relationship of the roads and rights of way of the telephone and electric power companies to those farms, and the former is no more part of "a farm" than the latter.



C. PETITIONER'S OPERATIONS ARE NOT "INCIDENTAL TO OR IN CONJUNCTION WITH SUCH FARMING OPERATIONS"

Even if the court should decide that petitioner's employees were employees "of a farmer" or that the office, the reservoirs and the canals where they work are "on a farm," this portion of section 3 (f) would not operate to exempt them. The courts have held consistently that even where employees are admittedly employed by a farmer and engaged exclusively in practices which would be considered "incidental to or in conjunction with such farming operations" if restricted to products grown by their employer, the requirement expressed in the definition that such practices be only with reference to "such farming operations" precludes application of the exemption to such incidental or conjunctive practices where they are performed on agricultural commodities grown by other farmers in addition to those grown by their employer-farmer.

The application of this principle to the exemption for agriculture under the Fair Labor Standards Act is perhaps best illustrated by the decision in *Bowie v. Gonzales*, 117 F. (2d) 11 (C. C. A. 1), in which the exemption provided by Section 13 (a) (6) was asserted. The employer raised sugar cane and also owned sugar mills where it processed the cane into raw sugar and molasses. In addition to grinding its own cane, the employer also ground some cane grown by other farmers known as colonos. The employees in

question were the mill employees who ground both their employer's cane and that of the colonos. The contention that the mill employees and employees who transported colonos' cane from the farm to the mill were engaged in agriculture was rejected on the ground that the transportation and processing of the colonos' cane was not incident to or in conjunction with the employer's farming activities. The court stated (p. 18):

It is apparent from the wording of this language that the practices must be performed by the farmer as an incident to *such* farming operation. Clearly, the processing of the colonos' sugar cane, which comprises a sizeable percentage of the appellants' total processing, is not performed as an incident to the farming operations of the appellants. The processing of the colonos' sugar cane is incident to or in conjunction with the milling operations of the appellants and has no connection with their farming activities. \* \* \* We think it clear that the grinding of sugar cane for the colonos is not incidental to the appellants' own farming operations.

To the same effect are the decisions in *Jordan v. Stark Bros. Nurseries & Orchards Co.*, 45 F. Supp. 769 (W. D. Ark.) (employees handling plants and trees grown by their employer as well as nursery stock purchased from other growers); *Walling v. Peacock Corp.*, 58 F. Supp. 880 (E. D. Wis.) (buying, selling, storing and dealing in

union sets of the employer and of commodities grown by others); *Byus v. Traders Compress Co.*, 59 F. Supp. 18 (W. D. Okla.) (employees of a cotton compress, compressing cotton grown by others than their employers); *Bruno v. Hills Bros. Co.*, 7 Labor Cas. 61,178 (D. P. R. 1943) (employees in a canning plant held exempt under Section 13 (a) (6) while engaged solely in canning fruits and vegetables grown by their employer, but held not exempt while canning fruits and vegetables grown by others and purchased by their employer).

The *Bowie* decision is in accord with the published interpretation of the Administrator: "When a farmer is engaged in these practices on agricultural or horticultural commodities grown on other farms as well as his own, as for example, when he cans tomatoes which come both from his farm and from the farms of others, such operations do not seem to be incident to or in conjunction with his farming operations. In our opinion such operations assume the aspect of an independent business and do not fall within this exemption." Par. 10 of Interpretative Bulletin No. 14, issued August 21, 1939, Wage and Hour Division, U. S. Department of Labor, 1942 Wage and Hour Man., pp. 407-408.

## IV

PETITIONER'S BOOKKEEPER-ACCOUNTANT, LIKE ITS OTHER EMPLOYEES, IS ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE WITHIN THE MEANING OF THE ACT

The district court held that all of petitioner's employees, except the bookkeeper-accountant, were engaged in occupations necessary to the production of goods for commerce within the meaning of the Act. The court below affirmed this holding but did not discuss coverage with respect to the bookkeeper-accountant. His status was decided on the basis of the exemption for employees employed in a bona fide administrative capacity. Since petitioner did not seek review by this Court of the decision of the court below that its employees (except the bookkeeper-accountant) were engaged in the production of goods for commerce within the meaning of the Act, and does not challenge this holding in its brief, the only question on this point which is presented for decision is with reference to the bookkeeper-accountant.

It was stipulated by the parties (R. 22-23) and found by the district court (R. 117-118) that all the work performed by the bookkeeper-accountant "is necessary in the conduct of defendant's business \* \* \*".

As petitioner's only business is supplying water to farmers, it follows that the bookkeeper-ac-



countant's activities are just as necessary to the production of goods for commerce carried on by those farmers as the activities of any of petitioner's other employees. His services, therefore, should not be considered differently from those performed by petitioner's other employees. The performance of identical or comparable services for farmers has been held within the scope of the Act by three other courts of appeal. *Reynolds v. Salt River Valley Water Users Assn.*, 143 F. 2d 863 (C. C. A. 9); *Meeker Cooperative Light & Power Assn. v. Phillips*, 158 F. 2d 698 (C. C. A. 8); *McComb v. Super-A Fertilizer Works, Inc.*, 165 F. 2d 824 (C. C. A. 1); cf. *Walling v. Friend*, 156 F. 2d 429 (C. C. A. 8). Activities bearing a similar relation to other types of production have consistently been held necessary to production within the meaning of the Act by this Court and other Courts. *Roland Electrical Co. v. Walling*, 326 U. S. 657; *Armour & Co. v. Wantock*, 323 U. S. 126, 130; *Warren-Bradshaw Drilling Co. v. Halt*, 317 U. S. 88; *Walling v. Amidon*, 153 F. 2d 159 (C. C. A. 10); *Mid-Continent Pipe Line Co. v. Hargrave*, 129 F. 2d 655 (C. C. A. 10); *Lewis v. Florida Power & Light Co.*, 154 F. 2d 751 (C. C. A. 5); *West Kentucky Coal Co. v. Walling*, 153 F. 2d 582 (C. C. A. 6); *Griffin Cartage Co. v. Walling*, 153 F. 2d 587 (C. C. A. 6); *Walling v. McGrady Construction Co.*, 156 F. 2d 932 (C. C. A. 3).

The decisions of this Court and the courts of appeals establish that clerical and administrative services are as much a part of production as the activities to which they relate. "Equally a part of that [productive] pattern are the administration, management and control of the various physical processes together with the accompanying accounting and clerical activities." *Borden Co. v. Borella*, 325 U. S. 679, 683. In *Roland Electrical Co. v. Walling*, 326 U. S. 657, the Act was held applicable to office employees, among others, of a company engaged in repairing machinery and reconditioning electrical motors used by industrial firms in the manufacture of goods destined for interstate shipment. See also *Hertz Drivursel Stations, Inc. v. United States*, 150 F. 2d 923 (C. C. A. 8); *Meeker Cooperative Light & Power Assn. v. Phillips*, 158 F. 2d 698, 699 (C. C. A. 8); *Walling v. Friend*, 156 F. 2d 429 (C. C. A. 8); cf. *Ritch v. Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334, 337 (C. C. A. 9).

The district court found as a fact that the work performed "as bookkeeper and accountant, is necessary in the conduct of defendant's business" (R. 117). This is sufficient to establish the error of the district court's conclusion of law (R. 118, 121) that this employee was not engaged in the production of goods for commerce within the meaning of the Act. *Armour & Co. v. Wantock*, 323 U. S. 126, 130.

PETITIONER'S BOOKKEEPER-ACCOUNTANT IS NOT EXEMPT AS AN "EMPLOYEE EMPLOYED IN A BONA FIDE \* \* \* ADMINISTRATIVE \* \* \* CAPACITY (AS SUCH TERMS ARE DEFINED AND DELIMITED BY REGULATIONS OF THE ADMINISTRATOR)"

As shown in the Statement (*supra*, pp. 7-10), the Farmers Reservoir and Irrigation Company has four classes of employees, one of which was composed of the employees in its Denver Office (R. 114). The only employee in that group who is involved in this litigation is the company's bookkeeper-accountant, Ermil E. Coler. Though the company's answer set up its claim for the agriculture exemption in some detail, no plea of the administrative exemption was made (R. 8-10). On the contrary, it was stipulated with respect to this employee that "For the purposes of this case only, defendant does not contend that Mr. Coler is exempt under either the 'administrative' or 'executive' provisions of the Act \* \* \*" (R. 23). The duties of Mr. Coler were summarized in the stipulation (R. 22-23), but no mention was made of his compensation except that he worked over forty hours a week without receiving overtime pay (R. 23). No question was raised in the district court concerning the exemption of Mr. Coler as an "administrative" employee, and that court, without touching on the question of "administrative" exemption, held that he was outside the scope of the Act because he was not engaged

in the production of goods for commerce, and that he was exempt from its provisions because he was employed in agriculture (R. 121). The Administrator appealed from these rulings of the district court (R. 123).

The question as to the applicability of the "administrative" exemption to Mr. Coler was not injected into this case until the filing of the company's brief in the court of appeals. There the company for the first time claimed that the bookkeeper-accountant was exempt as an "administrative" employee, and that its sole reason for stipulating that the employee was not exempt as an "administrative" employee had been the failure of the company to meet the \$200.00 monthly salary requirement of the Regulation. The company then stated "we now in this manner state and inform the Court and the Administrator and his counsel that, pursuant to a general salary increase \* \* \* which became effective on October 1, 1947 [more than six months after the opinion of the district court, R-99-106] his salary since that time had been and now is \$209.00 per month" (Appellee's Brief in the court below, p. 44).

The court of appeals, after reaching the conclusion that the company's employees were engaged in the production of goods for commerce and that the agriculture exemption was inapplicable (R. 130-131) held that because the bookkeeper-accountant was then receiving \$210.00 (sic) per



month, he was exempt as an administrative employee, and that the question of enjoining future violations of the Act as to him "is now moot and therefore does not call for discussion" (R. 133-134).

It should be noted that petitioner, in its brief filed in this Court, does not repeat these factual statements outside the record, nor even repeat the contention that the "administrative" exemption is applicable to this employee. Petitioner now rests its argument with reference to this employee on the contention that, unlike its other employees, he was not engaged in the production of goods for commerce within the meaning of the Act (discussed in Point IV of the argument in this brief) and that, like other employees, he was exempt as "engaged in agriculture" (discussed in Points I, II and III of the argument in this brief).<sup>17</sup> Notwithstanding petitioner's apparent abandonment of its claim with reference to the "administrative" exemption, it seems necessary to discuss the point in this brief since we are seeking, in cause No. 196, to reverse the decision of the court of appeals on this point.

<sup>17</sup> Whatever conclusion is reached as to the other classes, clearly the office employees (who are not employed by a farmer, whose work is not performed on a farm, and who are not required to possess any agricultural skill or experience) are not exempted as "engaged in agriculture". See *Janes v. Gaylord Guernsey Farms*, 128 F. 2d 1008 (C. C. A. 10.)

This ruling of the court of appeals with respect to the administrative exemption was plain error and should be reversed for the following reasons:

*First:* Even if this Court should conclude that the administrative exemption was raised properly and that the salary requirement has been proved adequately, (but see reasons *second* and *third, infra*) the exemption would not apply to the bookkeeper-accountant because the record shows that the other conditions for exemption were not met.

Section 13 (a) (1), which provides the exemption for any "employee employed in a bona fide \* \* \* administrative \* \* \* capacity," expressly limits that term with the phrase "as defined and delimited by regulations of the Administrator." The Administrator's regulations issued pursuant thereto (Title 29, Code of Federal Regulations, Part 541, § 541.2, 5 F.R. 4077) define the phrase as meaning any employee "(a)" who is paid not less than \$200 per month, "and (b)" who satisfies one of the four alternative conditions describing the work performed.<sup>18</sup> The court below seemingly ignored the necessity for

<sup>18</sup> These regulations stand on a more authoritative footing (see *Bowles v. Seminole Rock and Sand Co.*, 325 U. S. 410) than the interpretation of other sections of the Act where no special regulatory power is granted, but which are issued by the Administrator as "a practical guide to employers and employees as to how the office representing the public interest in \* \* \* enforcement [of the law] will seek to apply it." *Skidmore v. Swift & Co.*, 323 U. S. 134, 138. This Court has held that even such interpretations are entitled to "great weight." *Roland Electrical Co. v. Walling*, 326 U. S. 657.

meeting this additional requirement. This construction of the Regulation, as if (a) and (b) were alternative rather than conjunctive conditions, completely alters its meaning and is plainly erroneous. Thus, it was held in *George Lawley & Son Corporation v. South*, 140 F. 2d 439 (C. C. A. 1), certiorari denied, 322 U. S. 746, that a judgment denying exemption to a head bookkeeper and office manager on a \$5,000 per year salary should be affirmed because there was evidence that his duties did not fall "within any of the subparagraphs under (b)." The "conjunctive" nature of the six requirements expressed in the parallel section of the regulation defining the executive capacity was noticed by this Court in *Walling v. General Industries Co.*, 330 U. S. 545, 547, and the requirement of that regulation with relation to nature of duties as opposed to salary has been regarded as "the most pertinent test" (*Walling v. Yeakley*, 140 F. 2d 830, 832 (C. C. A. 10)).

The employee's duties as set forth in the stipulation (R. 22) and the finding of the district court (R. 117) indicate that he does not meet any of the four alternative requirements for exemption set forth in Section 541.2 (b) of the regulation,<sup>19</sup>

<sup>19</sup> While the general duties of this employee are described in the stipulated facts, they were not stipulated with reference to this issue, which was specifically disclaimed (R. 23) and there has been no adversary trial of the issue. See *Walling v. General Industries Co.*, *supra*. See also *Kennedy v. Silas Mason Co.*, 334 U. S. 249.

note, *supra*, p. 5. They reveal that he kept the company's books, prepared the annual statement, examined and recorded the employees' daily work reports, and checked them with the time sheets, apportioned the total time shown by the monthly time sheets among all the different accounts against which the work was charged, and assisted an outside certified public accountant in the annual audit of the company's books. These are the duties of a typical bookkeeper. They are not the functions required by sections (b) (1), (2), (3), or (4) of the regulations. Thus there is no evidence that he "regularly and directly assists" an administrative or executive employee or that such assistance is "non-manual in nature and requires the exercise of discretion and independent judgment" as required by Section (b) (1). Nor is there any evidence that he performs "responsible non-manual office or field work, \* \* \* along specialized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment" ((b) (2)). Nor is there any evidence that his work involved "the execution of special nonmanual assignments and tasks directly related to management policies \* \* \* involving the exercise of discretion and independent judgment" ((b) (3)). The criteria of Section (b) (4) relating to the transportation of goods or passengers are even



more obviously inapplicable to the bookkeeper-accountant's duties.

The Administrator's interpretation of these portions of his regulation was first expressed in the published "Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition" and has since been consistently followed. The report is reprinted at 1944-1945 W. H. Man. 674-715. It was prepared by the officer who held the hearings and recommended the original adoption of the sections of the regulations here involved. This report indicates that ordinarily bookkeepers are not exempt since "bookkeeping is \* \* \* one of the most routine of all the normal business occupations." 1944-1945 W. H. Man. at 699. The Administrator's reasonable construction of his own regulations is controlling, *Bowles v. Seminole Rock and Sand Co.*, 325 U. S. 410, 414.

The courts have also held that regardless of the salary requirement, bookkeepers are not ordinarily exempt under Section 13 (a) (1) because their duties do not qualify them for exemption under any of the alternatives provided under Part 541 of the regulations. *Geo. Lawley & Son Corp. v. South*, 140 F. 2d 439 (C. C. A. 1), certiorari denied, 322 U. S. 746; *Burke v. LeCrone-Benedict Ways*, 63 F. Supp. 883 (E. D. Mich.); *Brand v. McWilliams Dredging Co.*, 5 W. H. Cases 887, 1946 (E. D. N. Y.); *Kinney v. Grieder Machine Tool & Die Co.*, 5

W. H. Cases 776, 1945 (N. D. Ohio); *Patton v. Williams*, 61 F. Supp. 884 (E. D. Okla.); *Cassone v. Wm. Edgar John & Associates, Inc.*, 5 W. H. Cases 517, 1945 (N. Y. S. Ct.); *Giles v. Gilbert Associates, Inc.*, 5 W. H. Cases 783, 1945 (N. Y. C. Ct. Trial Term); *Kincaid v. Tennessee Copper Co.*, 5 W. H. Cases 535, 1945 (E. D. Tenn.); *Tesch v. Reine, Inc.*, 8 W. H. Cases 272, 1948 (S. D. N. Y.); *Walling v. Armour & Co.*, 6 W. H. Cases 886, 1947 (D. Kans.)<sup>20</sup>

*Second:* There is no evidence in the record to show that the bookkeeper-accountant meets the salary requirement of the exemption. The mere assertion of that fact in the company's brief in the court below can hardly serve as a basis for this Court's decision. Though the company "has briefed this appeal as though facts stated in the brief, but not shown by the record, may be given effect it is, of course, the record alone which controls as to the facts." *Bono v. United States*, 113 F. 2d 724, 725 (C. C. A. 2). Accord: *Schley v. Pullman Palace Car Co.*, 120 U. S. 575, 578; *Quagon v. Biddle*, 5 F. 2d 608, 610 (C. C. A. 8); *United States v. Van Dusen*, 78 F.

<sup>20</sup> The Administrator's Press Release, R-1116, and *Walling v. Newman*, 61 F. Supp. 971 (N. D. Iowa), decided in reliance thereon, are not contra, as they deal with employees whose duties as office managers are primarily administrative involving the use of discretion and whose clerical or bookkeeping duties are merely incidental to their administrative functions. Such a situation is certainly not shown here, and is not even suggested by the stipulation (R. 22).

2d. 121, 122 (C. C. A. 8); *Zell v. Bankers' Utilities Co.*, 77 F. 2d 22, 26 (C. C. A. 9); *Leonard v. Field*, 71 F. 2d 483, 487 (C. C. A. 9); *Globe & Rutgers Fire Ins. Co. v. Draper*, 66 F. 2d 985, 989 (C. C. A. 9).

*Third:* The Company's failure to assert, and its express waiver of, the defense in the district court should have precluded it from raising it in the court of appeals. The observation of this Court in *Helvering v. Wood*, 309 U. S. 344, 349, is appropriate:

To open here for the first time and in face of the express disclaimer an inquiry into the broader field is not only to deprive this Court of the assistance of a decision below but to permit a shift to ground which the taxpayer had every reason to think was abandoned in the earlier stages of this litigation.

As this Court recently observed with reference to the requirements expressed in the Regulation, the employer "had the burden of proving the existence of these conditions, if it would rely on its defense" of exemption under Section 13 (a) (1). *Walling v. General Industries Co.*, 330 U. S. 545, 548, and cases cited. In this case, far from pleading and proving the applicability of the exemption, the employer stipulated that the exemption was not claimed. See *Brown v. Gurney*, 201 U. S. 184, 190; *Railway Co. v. McCarthy*, 96 U. S. 258, 267.

*Fourth:* In any event, the case as to the book-keeper-accountant is not moot. The authority relied on by cross-respondent (*Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419) is altogether inapposite, as in that case the evidence that certain violations had ceased was a part of the record and had been subject to a specific finding by the trial court. In any event even if it clearly appeared that the employee in question now qualifies for the exemption, the company's brief in the court of appeals concedes (pp. 42, 44) that violations with respect to this employee were continuing throughout the trial in that the salary standard was not met until several months after the decision of the district court. Under these circumstances, as there is no assurance that the requirements of exemption, consistently violated in the past, will be observed in the future, the granting of injunctive relief would be warranted. *Walling v. Mid-Continent Pipe Line Co.*, 143 F. 2d 308 (C. C. A. 10); *Lenroot v. Interstate Bakeries Corp.*, 146 F. 2d 325 (C. C. A. 8); *Walling v. Fairmont Creamery Co.*, 139 F. 2d 318, 321 (C. C. A. 8); *Lenroot v. Kemp*, 153 F. 2d 153 (C. C. A. 5). Clearly "the case is not moot under these circumstances. \* \* \* Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power." *Walling v. Helmerich & Payne*, 323 U. S. 37, 43;



and see *United States v. Trans-Missouri Freight Assn.*, 166 U. S. 290.

CONCLUSION

For the foregoing reasons the judgment of the court below should be affirmed in No. 128 and reversed in No. 196.

Respectfully submitted.

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DECEMBER 1948.

# APPENDIX

## (INTERPRETATIVE BULLETIN)

### FARMERS' COOPERATIVE ASSOCIATIONS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

Title 29, Chapter V, Code of Federal Regulations

#### Part 780—Subpart C

This Bulletin Supersedes and Replaces All Prior General and Specific Interpretations Contained in Interpretative Bulletin No. 10, Releases, Opinion Letters and Other Statements Issued with Respect to Farmers' Cooperative Associations Under the Fair Labor Standards Act of 1938.

September 1947<sup>1</sup>

UNITED STATES DEPARTMENT OF LABOR

WAGE AND HOUR DIVISION

OFFICE OF THE ADMINISTRATOR

### FARMERS' COOPERATIVE ASSOCIATIONS UNDER THE FAIR LABOR STANDARDS ACT OF 1938\*

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<sup>1</sup> Published in the Federal Register September 9, 1947.

\*Title 29, Chapter V, Subchapter B, Code of Federal Regulations, Part 780—Subpart C.

## SECTION 780.80. INTRODUCTORY STATEMENT

(a) Since the enactment of the Fair Labor Standards Act of 1938, the views of the Administrator as to the application of the Act to farmers' cooperative associations have been expressed in interpretations issued from time to time in various forms. These interpretations were always issued with the understanding that they were only advisory, so far as the rights and liabilities of employers and employees were concerned, because the courts alone had the authority to make legally binding interpretations. However, the Portal-to-Portal Act of 1947<sup>2</sup> contemplates that interpretations of the Administrator will now, under certain circumstances, be controlling in determining such rights and liabilities in the courts. This has made it necessary, for the protection of employees and employers who may seek to rely on the Administrator's interpretations, that interpretations previously issued concerning the application of the Fair Labor Standards Act to farmers' cooperative associations be re-examined in order to determine whether they now correctly interpret the law in the light of developments subsequent to their issuance, and that the administrator's position be clarified for the future. This bulletin, as of the date of its publication in the Federal Register, supersedes and replaces such prior interpretations. Its purpose is to make available in one place general interpretations of the Administrator which will provide "a practical guide to employers and employees as to how the office representing the public interest

<sup>2</sup> Pub. Law 49, 80th Cong., Chap. 52, 1st Sess.

in enforcement of the law will seek to apply it.”<sup>3</sup> The interpretations contained in this bulletin indicate, with respect to the application of the Fair Labor Standards Act to farmers’ cooperative associations, the construction of the law which the Administrator believes to be correct and which will guide him in the performance of his administrative duties under the Act unless and until he is otherwise directed by authoritative decisions of the courts or concludes, upon re-examination of an interpretation, that it is incorrect.

(b) Effective on the date of publication of this bulletin in the Federal Register, all prior general and specific interpretations contained in interpretative bulletins, releases, opinion letters and other statements issued with respect to the application of the Fair Labor Standards Act to farmers’ cooperative associations are rescinded and withdrawn. An interpretation so rescinded and withdrawn shall not hereafter constitute an interpretation of the Administrator unless and until it is reissued as such. However, the action of the Administrator in rescinding or withdrawing any such prior interpretation or his omission to discuss a particular problem in this bulletin or in interpretations supplementing it does not constitute an administrative interpretation or practice or enforcement policy.

#### SECTION 780.81. EXEMPTION AS DEPENDENT ON ENGAGEMENT IN “AGRICULTURE,” AS DEFINED BY THE ACT

Employees of cooperative associations, the members or stockholders of which are farmers are

<sup>3</sup> *Skidmore v. Swift & Co.*, 323 U.S. 134.



granted no express exemption from the provisions of the Fair Labor Standards Act. Section 13 (a) (6), however, exempts from both the wage and hours provisions of the Act any employee employed in "agriculture," which is defined in section 3 (f) as including "farming in all its branches and among other things, includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15 (g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." This bulletin will address itself to the question which has been raised most often by the inquiries received from farmers' cooperative associations: Are the employees employed by such associations, solely because of that fact, engaged in " \* \* \* practices (including any forestry or lumbering operations) performed by a farmer \* \* \* as an incident to or in conjunction with" farming operations and therefore exempt? In other words, is a farmers' cooperative a "farmer" within the meaning of section 3 (f)?

SECTION 780.82. EMPLOYEES OF ASSOCIATIONS ARE NOT EXEMPT MERELY BECAUSE OF MEMBERS' FARMING ACTIVITIES

(a) The phrase "by a farmer" was intended to cover practices performed either by the farmer himself or by the farmer through his employees. Employees of a farmers' cooperative, however, are employed not by the individual farmers who compose its membership or who are its stockholders, but by the cooperative association itself. Cooperative associations, whether in the corporate form or not, are distinct, separate entities from the farmers who own or compose them. The work performed by a farmers' cooperative association is not work performed *by* a farmer but *for* farmers. The legislative history of the Act supports this interpretation. Statutes usually exempt farmers' cooperative associations in express terms if an exemption is intended. The omission of an express exemption from the Fair Labor Standards Act is significant since many unsuccessful attempts were made on the floor of Congress to secure special treatment for such cooperatives. Employees of a farmers' cooperative association, therefore, in our opinion, are not engaged in "any practices \* \* \* performed *by a farmer* \* \* \*" within the meaning of section 3 (f) and are not exempt on the basis of this part of the definition of "agriculture" from the wage and hours provisions of the Act.

(b) This does not mean that all employees of farmers' cooperative associations are subject to the provisions of the Act. They, like the employees of any other employer, if they meet the requirements, are subject to the 13 (a) (6), 7 (c),

or 13 (a) (10) exemptions. See, for example, our bulletin entitled "Forestry or Lumbering Operations, Incident to or in Conjunction with Farming Operations," dealing with forestry or lumbering operations. Moreover, to be subject to the provisions of the Act, employees of farmers' cooperative associations, like other employees, must be engaged in interstate commerce or in the production of goods for interstate commerce.

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**NO. 196**

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**FILED**

**AUG 4 1948**

**SHARLES CLARKE CROFT**  
**CLERK**

**IN THE**

**Supreme Court of the United States**

**October Term, 1948.**

**WILLIAM R. MCCORM, Administrator of the Wage  
and Hour Division, United States Department  
of Labor, Petitioner**

**v.**

**THE FARMERS RESERVOIR AND IRRIGATION COMPANY,  
A Corporation.**

**CONDITIONAL CERTIFICATION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES NINTH  
COURT OF APPEALS FOR THE TENTH CIRCUIT**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1948.

---

No. ....

WILLIAM R. McCOMB, Administrator of the Wage  
and Hour Division, United States Department  
of Labor, *Petitioner*

v.

THE FARMERS-RESERVOIR AND IRRIGATION COMPANY,  
A Corporation.

---

**CONDITIONAL CROSS-PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE TENTH CIRCUIT**

The Solicitor General on behalf of William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Tenth Circuit, holding that respondent's bookkeeper-accountant was exempt from the provisions of the Fair Labor Standards Act as an administrative employee, the writ to issue only in the event this Court should grant the petition for a writ of certiorari in No. 128, at this Term.

**OPINIONS BELOW**

The findings of fact and conclusions of law of the district court (R. 107-121) are not reported. The majority and dissenting opinions of the circuit court of appeals (R. 127-137) are reported at 167 F. 2d 911.

**JURISDICTION**

The judgment of the circuit court of appeals was entered on April 23, 1948 (R. 138). The petition for a rehearing was denied on May 25, 1948 (R. 146). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTIONS PRESENTED**

1. Whether the fact that an employee was paid over \$200 per month in itself made him an "administrative" employee exempt from the Fair Labor Standards Act, when the controlling Regulation contained additional requirements not found to have been satisfied.

2. Whether it was proper for the court below to have held an employee exempt from the statute upon the basis of a fact set forth in respondent's brief but not found in the record, and when the respondent had expressly stipulated that it was not making any claim under the exemption in question.

3. Whether, assuming the statement in respondent's brief to be the fact, the increase in the employee's pay to an amount in excess of \$200 per month while the case was pending on appeal made the case moot in so far as the issue of his status was concerned.

## STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938, c. 676; 52 Stat. 1060, 29 U.S.C. 213, are as follows:

Sec. 13(a). The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide \* \* \* administrative \* \* \* capacity \* \* \* (as such terms are defined and delimited by regulations of the Administrator); \* \* \*

Section 541.2 of the Regulations of the Administrator, Wage and Hour Division, Department of Labor (7 F. R. 332; 29 C.F.R. Cum. Supp. (1943), Sec. 541.2), promulgated pursuant to Section 13 (a)(1) of the Fair Labor Standards Act, reads as follows:

The term "employee employed in a bona fide \* \* \* administrative \* \* \* capacity" in section 13(a)(1) of the act shall mean any employee—

(A) who is compensated for his services on a salary or fee basis at a rate of not less than \$200 per month (exclusive of board, lodging, or other facilities), and

(B) (1) who regularly and directly assists an employee employed in a bona fide executive or administrative capacity (as such terms are defined in these regulations), where such assistance is nonmanual in nature and requires the exercise of discretion and independent judgment; or



- (2) who performs under only general supervision, responsible nonmanual office or field work, directly related to management policies or general business operations, along special-ized or technical lines requiring special training, experience, or knowledge, and which requires the exercise of discretion and independent judgment; or
- (3) whose work involves the execution under only general supervision of special nonmanual assignments and tasks directly related to management policies or general business operations involving the exercise of discretion and independent judgment; or
- (4) who is engaged in transporting goods or passengers for hire and who performs, under only general supervision, responsible outside work of a specialized or technical nature requiring special training, experience, or knowledge, and whose duties require the exercise of discretion and independent judgment.

#### **STATEMENT**

In the instant case the Wage and Hour Administrator filed a complaint in the United States District Court for the District of Colorado, seeking to enjoin the respondent from further violating the

Fair Labor Standards Act as charged in the complaint. The facts of the case are set out in detail in the Administrator's Brief in Opposition filed in the case of *The Farmers Reservoir and Irrigation Company v. McComb*, No. 128, at this Term. As shown therein, the Farmers Reservoir and Irrigation Company has four classes of employees, one of which was composed of the employees in its Denver office (R. 144). The only employee in that group who was involved in the litigation was the company's bookkeeper-accountant, Ermil E. Coler, with respect to whom it was stipulated that "For the purposes of this case only, defendant does not contend that Mr. Coler is exempt under either the 'administrative' or 'executive' provisions of the Act \* \* \*" (R. 23). The duties of Mr. Coler were summarized in the stipulation (R. 22), but no mention was made of his compensation except that he worked over forty hours a week without receiving overtime pay (R. 23). No question was raised in the district court concerning the exemption of Mr. Coler as an administrative employee, and that court, without touching the question of "administrative" exemption, held that he was outside the scope of the Act because he was not engaged in the production of goods for commerce, and that he was exempt from its provisions because he was employed in agriculture (R. 121). The Administrator appealed from these rulings of the district court (R. 123). In the circuit court of appeals, counsel for the employer for the first time claimed the "administrative" exemption for this employee. In support of this claim it was stated in the brief that the company's sole reason for entering into

the stipulation that the employee was not exempt as an "administrative" employee had been the failure of the company to meet the \$200 monthly salary requirement of the regulation, and that subsequent to the entry of the judgment by the district court, the company had raised the employee's salary to \$209 per month. The circuit court of appeals, after reaching the conclusion that all of the company's employees were engaged in the production of goods for commerce (R. 130-131), held that because the bookkeeper-accountant was then receiving \$210 (sic) per month, he was exempt as an administrative employee, and that the question of enjoining future violations of the Act as to him "is now moot and therefore does not call for discussion" (R. 133-134).

#### REASONS FOR GRANTING THE WRIT

The court below has held an employee within the exemption from the Fair Labor Standards Act for "administrative" employees because his salary is over ~~\$200~~ \$200 per month. This ruling completely disregards the governing Regulation (see pp. 3-4, *supra*) which makes payment of over \$200 per month only one of two requisites which must be fulfilled. Whether the Regulation is to be construed as establishing only a monetary test, in disregard of its other provisions, presents an important question. In addition, the court below departed from the accepted and usual course of judicial proceeding in deciding this portion of the case upon the basis of an issue specifically disclaimed by counsel for the respondent, and upon the basis of facts stated in the respondent's brief rather than in the

record and nowhere else confirmed or developed.

Inasmuch as only one employee, whose status was treated quite cursorily, is involved in this aspect of the case, this case might not be sufficiently important to warrant an independent petition for certiorari, despite the importance of a proper construction of the Regulation. But if the Court determines to grant the company's petition in No. 128, we believe that it should review the entire case and correct the plain error of the court below with respect to the administrative exception. Accordingly we are filing this conditional cross-petition.

1. The court below clearly erred in holding (R. 133) that because Coler's pay exceeded \$200 per month he came within the administrative exemption. For the Regulation promulgated under the exemption (pp. 3-4, *supra*) defines an "administrative employee" "(A)" as one paid not less than \$200 per month, "and (B)" who satisfies one of four alternative conditions describing the work performed. The court below seemingly ignored the necessity for meeting this additional requirement. This construction of the Regulation, as if (A) and (B) were alternative rather than conjunctive conditions, completely alters its meaning, and is unquestionably erroneous.

Furthermore, the employee's duties as set forth in the stipulation (R. 22), as found by the lower court (R. 117), and as his title indicates, are primarily those of an ordinary bookkeeper. He keeps the company books, prepares the annual statement, examines and records the employees' daily work reports and checks them with the time sheets, apportions the total time shown by the monthly time



sheets among all the different accounts against which the work was charged, and assists an outside certified public accountant in the annual audit of the company's books. Under the official interpretation of the Administrator's regulations, such bookkeepers are not regarded as within the exemption, irrespective of the amount of their compensation.<sup>1</sup>

2. The decision below disregards the accepted principle that cases must be decided upon the basis of the facts in the record and not merely statements of fact by counsel in the briefs. The opinion below

<sup>1</sup> The Administrator's interpretation of his regulations is set forth in the "Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition." The report is reprinted at 1944-1945 W. H. Man. 674-715. This report indicates that ordinarily bookkeepers are not exempt since "bookkeeping is \* \* \* one of the most routine of all the normal business occupations." 1944-1945 W. H. Man. at 699. The Administrator's reasonable construction of his own regulations, unlike his other interpretations of the Act which are merely entitled to "great weight" (see *Skidmore v. Swift & Co.*, 323 U. S. 134), is controlling. *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414; *Armstrong Co. v. Walling*, 161 F. 2d 515, 517 (C. C. A. 1). The Administrator's reasons for holding that the exemption would be inapplicable here in any event because the employee's duties are not of an "administrative" character are more fully set forth in his Petition for Rehearing (R. 139-145).

<sup>2</sup> *Schley v. Pullman Car Co.*, 120 U. S. 575, 578; *Bono v. United States*, 113 F. 2d 724, 725 (C. C. A. 2); *Sinko Tool & Mfg. Co. v. Automatic Devices Corp.*, 157 F. 2d 974, 976 (C. C. A. 2); *Quagon v. Biddle*, 5 F. 2d 608, 610 (C. C. A. 8); *United States v. Van Dusen*, 78 F. 2d 121, 122 (C. C. A. 8); *Zell v. Bankers Utilities Co.*, 77 F. 2d 22, 26 (C. C. A. 9); *Leonard v. Field*, 71 F. 2d 483, 487 (C. C. A. 9); *Globe & Rutgers Fire Ins. Co. v. Draper*, 66 F. 2d 985, 989 (C. C. A.

implies that it is proper to go outside the record inasmuch as respondent's action in increasing Coler's pay beyond \$200 per month made the case moot. But, as we have shown, this fact (if assumed to be adequately shown by the statement in the brief) would not in itself have brought Coler within the exemption; and thus clearly could not have made the case moot. And even if it had qualified Coler for the exemption, the voluntary cessation by a defendant of unlawful conduct, while a case is on appeal does not deprive the Government of the right to an injunction or make the case moot. *United States v. Trans-Missouri Freight Association*, 166 U. S. 290; *Walling v. Helmerich & Payne*, 323 U. S. 37, 43.<sup>3</sup>

It is also to be observed that, as this Court has recently stated, the burden of bringing itself within the exemption rested upon the respondent, *Walling v. General Industries Co.*, 330 U. S. 545, 547-8, and cases cited. In this case, far from pleading and proving the applicability of the exemption, the employer here stipulated that the exemption was not claimed. See *Brown v. Gurney*, 201 U. S. 184, 190; *Railway Co. v. McCarthy*, 96 U. S. 258, 267.

9). If in fact the circumstances with regard to the book-keeper have changed, the proper procedure for the company to follow is to apply to the district court for a reopening of the case to show the changed circumstances. *Drivers Union v. Meadowmoor Co.*, 312 U. S. 287, 298; *Coca-Cola Co. v. Standard Bottling Co.*, 138 F. 2d 788 (C. C. A. 10).

<sup>3</sup> See also *Walling v. Mid-Continent Pipe Line Co.*, 143 F. 2d 308 (C. C. A. 10); *Lenroot v. Interstate Bakeries Corp.*, 146 F. 2d 325 (C. C. A. 8); *Walling v. Fairmont Creamery Co.*, 139 F. 2d 318, 321 (C. C. A. 8); *Lenroot v. Kemp*, 153 F. 2d 153 (C. C. A. 5).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that in the event the Court should grant the petition for a writ of certiorari in No. 128, this petition for a writ of certiorari should likewise be granted.

PHILIP B. PERLMAN,  
*Solicitor General.*

WILLIAM S. TYSON,  
*Solicitor of Labor.*

August, 1948.

**PETITION OF THE FARMERS RESERVOIR AND IRRIGATION COMPANY FOR REHEARING AND FOR ENLARGEMENT OF TIME FOR ISSUANCE OF MANDATE AND STAY OF MANDATE.**

FILED

JUL 21 1949

CHARLES ELMORE CROPLEY  
CLERK

IN THE  
**SUPREME COURT OF THE  
UNITED STATES**

**OCTOBER TERM, 1948**

Nos. 128 and 196.

**THE FARMERS RESERVOIR AND IRRIGATION COMPANY, a Corporation, PETITIONER,**

v.

**WILLIAM R. McCOMB, Administrator of the Wage and Hour Division of the United States Department of Labor, RESPONDENT.**

**WILLIAM R. McCOMB, Administrator of the Wage and Hour Division of the United States Department of Labor, PETITIONER.**

v.

**THE FARMERS RESERVOIR AND IRRIGATION COMPANY, a Corporation, RESPONDENT.**

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IN THE  
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**THE FARMERS RESERVOIR AND IRRIGATION COM-  
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**THE FARMERS RESERVOIR AND IRRIGATION COM-  
PANY, a Corporation, RESPONDENT.**

**PETITION OF THE FARMERS RESERVOIR  
AND IRRIGATION COMPANY FOR REHEAR-  
ING AND FOR ENLARGEMENT OF TIME FOR  
ISSUANCE OF MANDATE AND STAY OF  
MANDATE.**

The judgment of this Court was entered herein on June  
27, 1949, such judgment being a modified affirmance of the  
judgment of the Court of Appeals for the Tenth Circuit.  
(167 Fed. (2d) 911)

Petitioner, The Farmers Reservoir and Irrigation Com-

pany, now respectfully petitions this Honorable Court to grant a rehearing herein for the purpose of reconsidering the issues presented and the judgment entered and for enlargement of the time for issuance of mandate and stay of mandate until this petition for rehearing has been finally disposed of by the Court. In support of this petition, Petitioner respectfully shows as follows:

I.

**THE DIVISION OF THE COURT**

The judgment of the lower Court in this case is affirmed, with modification, pursuant to an Opinion of the Court, which was delivered by Mr. Chief Justice Vinson in behalf of himself and six Associate Justices.

Mr. Justice Frankfurter filed a brief concurring opinion acquiescing "in the judgment that commends itself to the majority of my brethren" prefaced by the statement that this case "presents a problem for construction which may with nearly equal reason be resolved one way rather than another".

Mr. Justice Jackson filed a dissenting opinion.

II.

**THE REASON FOR FILING THIS PETITION**

Petitioner has re-examined and reviewed its argument before the Court in the light of the three Opinions of the Court in the case and has reached the conclusion that a petition for rehearing should be filed and a reconsideration and re-argument of the issues involved should be granted because of the great public importance of the question decided and the serious impact and threatened disastrous effect upon irrigation in all the vast semiarid western portion of the United States where the word "irrigation" and the word "agriculture" by common knowledge, Court decisions and

judicial knowledge are, for all practical purposes, synonymous and where a large portion of the millions of acres, whose crops are so necessary to the welfare of all of the United States, is irrigated by irrigation waters diverted by the farmers from the public streams through the medium of mutual irrigation companies such as Petitioner. There are, we believe, hundreds of thousands of farmers who irrigate their millions of acres of land through many hundreds of mutual irrigation companies identical with or similar to Petitioner. This method of irrigation is not unique to the several hundred farmers who, in this one part of Colorado, irrigate their one hundred thousand or so acres of land through Petitioner, their medium of securing their necessary irrigation water from the public streams, but is the common practice throughout the rest of Colorado and also in all the other semiarid States, where "agriculture" and "irrigation" are synonymous, such as Wyoming, Montana, Utah, Idaho, California, New Mexico, Arizona and parts of other States.

It is our understanding that the Administrator instituted this proceeding against Petitioner as a test case and that no similar case has been filed involving the employees of other mutual irrigation companies pending the outcome of this case. This case affects, therefore, not merely the twenty to thirty employees of Petitioner and its few hundred farmer owners, but the rights and obligations of hundreds of thousands of farmers and perhaps thousands of similar mutual irrigation company employees throughout the entire West.

We emphasize this, particularly in view of the doubt expressed by Mr. Justice Frankfurter in his concurring opinion as to the reason why the Court took jurisdiction of this case on certiorari. The "public importance" of the question involved obviously appealed to the Court when it accepted jurisdiction. That public importance, we respectfully submit, still continues. Furthermore, there was a con-



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conflict between Courts of Appeal which required clarification by this Court.

The effect of the majority opinion of the Court in this case, if allowed to stand, is the application of the "strict" or "narrow" construction principle to the "agricultural" exemption in the Act. This, we submit, was not the Congressional intent. We further submit that, without an extreme application of the "strict" or "narrow" construction principle to the facts in this case, the majority opinion cannot be justified.

Mr. Justice Jackson, in his dissenting opinion, put it mildly when he surmised that the farmers would be "surprised" to learn that by judicial construction the ditch riders and reservoir tenders on their irrigation system, whose work, admittedly, constitutes an essential part of planting, cultivating, raising, harvesting and producing their agricultural crops, are not employed in agriculture.

Additional reasons for this petition for rehearing and reconsideration now follow.

The Court of Appeals in this instant case (167 Fed. (2d) 911, 914) expressly and purposely applied the "strict" or "narrow" construction principle to the agricultural exemption in the Act. This is contrary to the principle announced by the Second Circuit in **Damutz v. Pinchbeck, Inc.**, 158 Fed. (2d) 882, 883, where the Court stated:

"Although this exemption provision in a remedial statute should be construed strictly, it should, of course, be given due effect. It is drawn in far reaching language which shows the intent of Congress to make the term 'agriculture' cover much more than what might be called ordinary farming activity and that is what now controls. Different definitions of 'agriculture' in other statutes but indicate different Congressional methods in dealing with other matters and cannot serve to narrow the scope of this one."

to the decision of the Fifth Circuit in **U. S. v. Turner Turpentine Co.**, 111 Fed. (2d) 400, 404, 405, where it is stated:

" \* \* \* It is now a settled principle of statutory construction that Congress or a legislature in legislating with regard to an industry or activity, must be regarded as having had in mind the actual conditions to which the act will apply, that is, the needs and usages of such activity. When then, Congress in passing an act like the Social Security Act, uses, in laying down a broad general policy of exclusion, a term of as general import as 'agricultural labor', it must be considered that it used the term in a

## III.

## THE USE BY THE COURT OF "LEGISLATIVE HISTORY" AS AN AID IN CONSTRUING THE ACT

The Congress, in the opening sentence of Section 3, states "As used in this Act—" certain words shall have a stated meaning. "Agriculture" in Section 3(f) is given a most comprehensive meaning. There are no words of limitation. There are no words that limit the meaning of the word "agriculture" to the ordinary farm activities of farmers in the rainbelt of the United States or to the activities of farmers in the rainless belt of the United States. Congress must be regarded as having had in mind the actual and varied conditions and practices under which crops are raised in each and every portion of the United States and its territories and possessions where the Act operates.

sense and intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind, as that term is understood in the various sections of the United States where the act operates. This does not mean, of course, that a mere local custom which is in the face of the meaning of a general term used in an act, may be read into the act to vary its terms. It does mean, however, that when a word or term intended to have general application in an activity as broad as agriculture, has a wide meaning, it must be interpreted broadly enough to embrace in it all the kinds and forms of agriculture practiced where it operates, that its generality reasonably extends to. \* \* \* An examination of the cases cited in Words and Phrases, Fifth Series, Vol. 1, p. 339 et seq., under agriculture and in 3 C. J. S., Agriculture, pages 361, 365 and 366, Sec. 1, under 'agricultural' and 'agriculture', convinces that in modern usage this is a wide and comprehensive term and that statutes using it without qualification, must be given an equally comprehensive meaning."

and to the implication of the opinion of the Ninth Circuit in **Reynolds v. Salt River Valley Water Users Assn.**, 143 Fed. (2d) 863, 866, where in the footnote is found the following:

"Appellee did not make the affirmative plea that its employees were 'employed in agriculture' within the exemption of section 13 (a) (6) of the Act. That question was not raised here or in the court below. It is a question which well may affect the practice and rulings of the Wages and Hours Division of the Department of Labor in the performance of its functions under the Act. 'Our decision is without prejudice to the disposition of the question wherever appropriately presented.' **Blair v. Oesterlein**, 275 U. S. 220, 225, 48 S. Ct. 87, 89, 72 L. Ed. 249."

Examples of "agriculture" are given by the Court in its opinion which include "production" of agricultural commodities. Then the same word "production" is used and defined in Section 3 (j) and, as a result of the application of this definition, Petitioner's employees are held to be engaged in the production of goods for commerce and, hence, within the general coverage of the Act. Now the Congress has expressly stated that a defined word has the defined meaning throughout the Act. There is no ambiguity in the use of the word "production" as used in either Section 3(f) or Section 3 (j). If the same meaning shall be given to this word as used in the different Sections, then, we submit, necessarily Petitioner's employees are within the express definition of "agriculture" as they are within the "production of goods for commerce."

The Court, however, has gone outside the Act and to so-called "legislative history" to find a different meaning to the word "production" when used in one Section than when used in another. We respectfully submit that in doing this the Court has departed from its often announced rule that legislative history will be looked to in aid of construction only when the words used by Congress are not clear. It is not proper, we submit, to go outside the plain words of a Congressional Act to create the ambiguity, which is what we believe the Court has done here.

Almost contemporaneously with its opinion in this case the Court has reiterated its previously announced rule of refusal to consider legislative history where the Act is clear on its face. We quote from the opinion of Mr. Chief Justice Vinson in the case of *Ex Parte Joseph Collett, Petitioner*, decided May 31, 1949, and reported in United States Supreme Court Advance Opinions, Volume 93, page 901, 905.

"Third. Petitioner's chief argument proceeds not from one side or the other of the literal boundaries

of Sec. 1404 (a), but from its legislative history. The short answer is that there is no need to refer to the legislative history where the statutory language is clear. "The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *Gemsee, Inc. v. Walling*, 324 US 244, 260, 89 L ed 921, 933, 65 S Ct. 605 (1945). This canon of construction has received consistent adherence in our decisions.<sup>12</sup>

Furthermore, we submit, if resort to legislative history were proper at all in this case, the conclusion reached by the majority of the Court, as a result of that reference, is not sound. Even supposing the turpentine situation was the motivating reason for the inclusion of the word "production" in Section 3 (f), it was included before the Act was passed. It was not limited to turpentine or gum rosins. It is expressly directed to "any agricultural or horticultural commodities." How easy it would have been for the Congress to have limited it to turpentine or gum rosins if that was the Congressional intent. It did not do this, but directed "production" to all agricultural and horticultural commodities, knowing the definition of production in Section 3 (j). It did not change the opening sentence or clause of Section 3 to read "As sometimes used in this Act," but left it to read "As used in this Act."

We respectfully submit that the Court should not in this case have departed from its oft announced principle with reference to resort to legislative history. We furthermore submit that even though it deems it proper to do so in this case, the construction reached by the Court is unsound. Both suggestions, we believe, justify the Court's further consideration on this petition for rehearing.



## IV.

**THE COURT HAS DEPARTED FROM ITS PREVIOUS DECISIONS IN GROUNDING ITS OPINION ON ITS CONCLUSION AS TO THE NATURE OF PETITIONER AS AN EMPLOYER RATHER THAN UPON THE NATURE OF ITS EMPLOYEES' WORK**

In its majority opinion the Court cites its earlier decision of *Kirschbaum v. Walling*, 316 U. S. 517, 86 L. Ed. 1638, to the point that if an occupation, not in itself production for commerce, has "a close and immediate tie" with the process of production, it comes within the provisions of Section 3 (j). It was upon this theory that the District Court and the Court of Appeals held that Petitioner's employees were engaged in the production of (agricultural) goods for commerce. Petitioner does not produce any goods for commerce or otherwise, so it is not the nature of Petitioner's organization that brings the Petitioner's employees within the general coverage of the Act. It is the employees' own activities. The Court so expressly held in the *Kirschbaum* case, *supra*, where it said (quoting from page 1648 of the L. Ed. report):

.....But the provisions of the Act expressly make its application dependent upon the character of the employees' activities. And, in any event, to the extent that his employees are engaged in commerce or in the production of goods for commerce, the employer is himself so engaged. Nor can we find in the Act, as do the petitioners, any requirements that employees must themselves participate in the physical process of the making of the goods before they can be regarded as engaged in their production. Such a construction erases the final clause of Section 3 (j) which includes employees engaged 'in any process or occupation necessary to the production' and thereby does not

limit the scope of the statute to the preceding clause which deals with employees in any other manner working on such goods.

Again, in *McLeod v. Threlkeld*, 319 U. S. 491, 87 L. Ed. 1538, 1544, this Court said:

"It is the work of the employee which is decisive."

Now in the present case the Court has pitched its entire reasoning on its conclusions (erroneous conclusions as we will hereinafter point out) as to the nature of Petitioner (employer) as a mutual irrigation company rather than upon the nature of the activities of the employees themselves. This obvious departure from its earlier decisions is an additional reason, we urge, in support of the rehearing.

If Petitioner were a banking corporation, grocery company, or any other kind of employer, its nature or character of organization would be immaterial to the question here involved. The material question, as stated by the Court (p. 5), is whether the employees are engaged in the production of goods for commerce and whether those employees are employed in agriculture. The Court states that the Petitioner, as a corporate entity, owns no farms and raises no crops (p. 8). This is immaterial, we submit, if the employees are engaged in agriculture. The Court further states "irrigation, strictly defined—that is the actual watering of the soil—may no doubt be called farming." To a farmer this restricted definition of "irrigation" which would limit its meaning to the precise act of dropping this water on the land, would, for practical purposes, be useless. He has to get the water to the dropping point before it can be dropped. As appears from the stipulated facts in this case and as is commonly known, which is a fact of which all Courts, including this Court, have taken judicial notice (see cases in Petitioner's brief heretofore filed, pp. 10, et seq., 22,

et seq., and 27, et seq.), the irrigation water in the first instance is in the public streams, running sometimes close to and more times miles distant from the lands to be irrigated. This water can only be withdrawn from the public streams for agricultural purposes (or other beneficial purposes not here involved) pursuant to adjudication decrees entered by Courts of jurisdiction under the State administrative statutes.

It is necessary to get the water to the land. For this purpose ditches and reservoirs are built and maintained by the farmers directly or through their agents. The water must be diverted out of the stream and through the ditch or reservoir and into and through small lateral ditches to and on the lands to be irrigated by the labor of many individual workers, each doing an essential part of the completed whole. Then and then only is the water actually applied to the land. These various steps, from the stream to the actual application of the water to the land, are integral parts of an entire process. The work of each party is an essential ingredient to the "whole," which is "irrigation." If the farmer owner, or someone in his behalf, either directly or through a mutual ditch company created by him through necessity, (a) goes to the stream and diverts the water into the main ditch, (b) polices the water through the ditch and (c) in connection with all of this keeps the ditch in proper repair, such person, we submit, whether the farmer owner himself or someone else, is engaged in irrigation just as much as the man who runs the water through the small lateral on the land to be irrigated and directs it immediately to the growing plant. Each step is a part of the whole. It is some of these steps (links in an unbroken irrigation chain) which constitute the work of the Petitioner's field employees. That work, we submit, is irrigation and constitutes employment in agriculture, irrespective of the nature of the organization of Petitioner as an employer.

## V.

## THE COURT'S MISCONCEPTION OF THE NATURE OF PETITIONER AS A MUTUAL DITCH OR IRRIGATION COMPANY

In the next previous section of this petition, we have expressed our view that the majority opinion in this case is in conflict with the previous rulings of the Court to the effect that it is the work or activity of the employee rather than the nature of the employer that controls, both as to the coverage of the Act and the exemptions therefrom. An analysis of the majority opinion, however, shows that it is grounded upon factual statements and legal conclusions as to the nature of Petitioner, which, we respectfully submit, are not supported by the record and are at variance with the common concept and judicial determination of the nature of mutual ditch or irrigation companies, such as Petitioner.

This point is of such great importance that we earnestly entreat the Court to give its special consideration.

This case was presented to the Trial Court on a Stipulation of Facts (R. 11-98). We believe the Court has overlooked some of the important stipulated facts (and the law applicable thereto) and has drawn erroneous legal conclusions from other admitted facts.

On page 6 of the majority opinion the Court states the question involved to be as follows:

“.... The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity. ....”

On page 7 of the majority opinion the Court poses the determinative question to be as follows:

“In the absence of a detailed definition of agriculture we should be compelled to determine whether



the activity concerned in the present case—the diversion, storage and distribution of water for irrigation purposes—is carried on as part of the agricultural function or is so separately organized and conducted as to be treated as an independent, nonagricultural productive function. ....

After discussing this question stated in the two ways above quoted, the Honorable Chief Justice, in writing the majority opinion, concludes (pp. 13, 14) that Petitioner is a "separate business organization" and that

.... The controlling fact is that the company has been set up by the farmers as an independent entity to operate an integrated, unitary water supply system. The function of supplying water has thus been divorced by the farmers from the farming operation and set up as a separate and self-contained activity in which the farmers are forbidden, by the company's by-laws, to interfere.<sup>18</sup> Those employed in that activity are employed by the company, not by the farmers who own the company. The fact that the company is not operated for profit is immaterial. It is nonetheless the employer. Of course, if Congress had intended the absence of profit to be material and had provided that the employees of agricultural cooperatives should be exempted because their work is done for the benefit of the farmers who own the cooperatives we should honor that provision. But the legislative history of the existing definition clearly shows that no such result was intended.<sup>19</sup>

It is these conclusions which, we submit, are not supported by the stipulated facts or the law applicable thereto.

The Stipulation shows (R. 12) that owners of dry, grazing or nonproductive land, who wished to convert their land into irrigated farm land, organized Petitioner as a mutual ditch company to construct, maintain and operate for them a

system of ditches and reservoirs to divert and carry *their* (the *farmers'*) water from the public streams to their land. This water, under the Colorado Constitution and Statutes, can be diverted only for the irrigation of the lands of the farmer stockholders of Petitioner, or their nominees, (R. 13). It is clear that the lands of the Petitioner's stockholders became "irrigated" lands only because of and through the farmers organization of Petitioner. These lands are located, for the most part, miles distant from the public streams. No one individual farmer, or no few farmers acting together, could afford to construct the miles of ditches and the reservoirs required to get their irrigation water from the streams to the land. As a matter of common knowledge, water for one farm or a few farms, if one, or a few farmers "went it alone," would, as the result of seepage and evaporation, never reach the land sought to be irrigated. Hence, the several hundred owners of dry land went together and pooled their resources to construct an irrigation system by which all of their lands could be successfully irrigated.

The Court (p. 2) states that Petitioner "owns" the irrigation system. The Stipulation of Facts (R. 13) only states "the record title to the lands upon which defendant's canals and reservoirs are located stands in the name of the defendant." This is entirely different than an actual ownership in Petitioner. The record title to the ditches and reservoirs does stand in its name, but the equitable title and the real ownership are in its farmer stockholders whose lands are irrigated. Clearly, it would be cumbersome and impractical for the farmers who built and paid for (or are paying for, through the payment of Petitioner's outstanding bonds) the system to put and maintain the record title in several hundred names in different and varying proportions, so the "record title" is placed in a mutual ditch company (Petitioner) organized for that purpose as a matter of convenience.

Petitioner issued stock to the farmers who organized it

and who paid the initial cost and are paying subsequent costs for the construction of its system. Each share of stock represents a pro rata portion of the water diverted for all stockholders. *The stock does not represent the right to buy water* because Petitioner does not own any water to sell. The water right is owned by the farmer stockholders. As shown by the adjudication decrees pursuant to which the water is diverted from the public streams (R. 52), the water can be and is diverted only "for the benefit of the parties lawfully entitled thereto" who are the actual appropriators and users of water, namely, the farmer stockholders of Petitioner.

The Court (p. 8) comments upon the fact that Petitioner's employees do not actually apply the water to the stockholders' land, but that the farmer stockholders do that themselves. This is the case and is done so pursuant to By-laws which the farmers themselves adopted. Again, we submit, this is clearly a mere matter of administration. How impractical it would be for each farmer to go to the ditch or reservoir and operate the headgates and take his own water, or what he considers to be his pro rata share of the water diverted for all stockholders. The farmers themselves, in the interest of knowing that they will get their pro rata share of the water, adopted and imposed By-laws, for the protection of each farmer against the others, under which the ditch riders and lake tenders were directed by the farmers themselves to divide the water. The farmers have likewise decided that it would not be "good farming" to have these ditch riders (the number of which would be increased many times if such should be done) go onto the farms and actually apply the water.

The Court (pp. 2, 13) then comments upon the fact that Petitioner has an outstanding bond issue. True, and this represents an indebtedness created by the farmers themselves to help defray the cost of constructing their own irrigation system, which bond issue is secured by a Trust Deed lien on

the ditches and reservoirs. The ditches and reservoirs are worthless except to carry the water owned by the stockholders. They are part of the farmers' "water right." The Colorado Supreme Court has expressly so held in the several cases cited on page 34 of Petitioner's brief.<sup>2</sup>

Consequently, if this bond issue Trust Deed should be foreclosed, the farmers would lose their water right, including their physical irrigation system. To prevent this the farmers themselves annually levy upon themselves an assessment to pay bond principal and bond interest and maintenance and operation costs (including the employees' wages) to preserve their water right and secure their water (R. 16). This assessment is the only income Petitioner has, except an immaterial amount received from hunting licenses granted on some of the reservoirs. Petitioner can make no profit and can pay no dividends.

As shown by the Stipulation of Facts (R. 15, 16), the irrigation system is not subject to taxation to Petitioner. That irrigation system, under the Colorado mutual ditch laws and the Colorado Supreme Court decisions (only some of which are cited in Footnote 2, *supra*), as a part of the farmers' water right, is considered as an appurtenance to the land on which the water is used and, as a result thereof, that land is taxed at an increased value as "irrigated" land.

The above gives a correct picture of the nature of Petitioner as a mutual ditch or irrigation company.

<sup>2</sup>**Kendrick v. Twin Lakes Res. Co.**, 58 Colo. 284, 144 P. 884;  
**Comstock v. Olney Springs Drainage Dist.**, 97 Colo. 416,  
 50 P. (2d) 531;  
**Beatty v. Board of County Commissioners of Otero County**,  
 101 Colo. 346, 73 P. (2d) 982.

Quoting from the **Kendrick v. Twin Lakes Res. Co.** case, 144 P. 885:

"The dam in the old channel has no utility or value disconnected from the reservoir; that is, in and of itself. The essential thing or real value is in the impounded water or water rights in the reservoir, and it is only as the dam, as a part of the system, is used to impound water, that it has any utility or value whatever. It is a means to an end, which is the furnishing of a supply of water for irrigation to the stockholders. \* \* \*



Now we most respectfully, but with equal insistence and sincerity, ask how the Court can reasonably or logically conclude from these facts that the Petitioner is a "separate business organization" (p. 13) and that it "has been set up by the farmers as an independent entity to operate an integrated, unitary water supply system" (p. 13). How can it be questioned (p. 6) that Petitioner's activities are carried on "as part of the agricultural function" and that it was not "separately organized as an independent productive activity". How can it be said (p. 13) that "The function of supplying water has thus been divorced by the farmers from the farming operation" when the farmers collectively own the land, the water and the physical system of ditches and reservoirs, and pay the annual maintenance expense of Petitioner, the annual payments on the bonded indebtedness created by the farmer stockholders and the wages of all ditch riders and reservoir tenders. In fact, by the transfusion of this constant energy, attention and paying of annual assessments, the farmers supply the very lifeblood of Petitioner without which Petitioner would be useless and entirely dead. This is not a divorcement. The true nature of a mutual ditch or irrigation company, such as Petitioner, has been judicially declared by the Colorado Supreme Court in a number of cases cited on pages 30 and 31 of Petitioner's brief. We quote again from the Colorado Supreme Court in *Beatty v. Board of County Commissioners of Otero County*, 101 Colo. 346, 73 P. (2d) 985, as a typical holding of a number of Colorado Supreme Court cases:

.... It definitely appears that this mutual canal company was organized for the convenience of its members in the distribution of their water for use upon their lands in proportion to their respective interests. Under these circumstances, the stock certificates of the canal company, in the form in which they were issued and held by the plaintiff, were merely the muniments of title to her water right, which water right, the thing of value owned by her, unques-

tionably was real estate and not corporate stock. This rule was clearly stated by Mr. Justice Butler in his concurring opinion, in which the majority of the court joined, in the case of *Comstock v. Clark Springs Drainage District*, 97 Colo. 416, 50 P. (2d) 531, 532 where it is said: 'Counsel for the plaintiff in error admit—and it is the law—that water rights for irrigation are real property. They say however, that shares of stock are personal property. That is true of shares of stock in corporations, including irrigation corporations, organized for profit; but where the company is a mutual irrigation company, or, as here, a mutual reservoir company, organized not for profit, but for the convenience of its members in the management of the irrigation system and in the distribution to them of water upon their lands in proportion to their respective interests, ownership of shares of stock in the corporation is but incidental to ownership of a water right, which is appurtenant to the land upon which the water is used.' See *Iretton v. Idaho Irrigation Co.*, 30 Idaho 310, 317, 164 P. 687, 689. In *Kendrick v. Twin Lakes Reservoir Co.*, 58 Colo. 281, 144 P. 884, we had occasion to pass upon the status of the capital stock of one of the companies involved here. We said: 'The corporation is purely a mutual reservoir company, in which the capital stock stands for and represents the consumer's interest in the reservoir, canal, and water rights.'

This judicial conception and determination of the nature of a mutual ditch or irrigation company as made by the Colorado Supreme Court is not limited to Colorado, but is common to all of the western semiarid States where irrigation prevails (see the authorities cited in Petitioner's brief at pages 22 et seq.).

The Court in this case, if the majority opinion is permitted to stand, is overruling the Supreme Court of the State of Colorado and the Appellate Courts of other western

States. We ask the Court not to do this, at least not without further consideration. We believe the principle of *Erie v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, to be applicable here. As recently as June 20, 1949, in *Interstate Oil Pipe Line Co. v. Stone*, this Court, in the majority opinion, written by Mr. Justice Rutledge and joined in by Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Murphy, and in its dissenting opinion, written by Mr. Justice Reed, joined in by the Chief Justice and Mr. Justice Frankfurter and Mr. Justice Jackson, reaffirmed the principle announced in the *Erie v. Tompkins* case and held that the Supreme Court was bound by the Mississippi Supreme Court construction of the Mississippi laws.

Again, in the cases of *Wheeling Steel Corporation v. Glander* and *National Distillers Products Corporation v. Glander*, also decided by this Court on June 20, 1949, and which cases involved Ohio tax statutes on intangibles, the Court expressly held it was bound by the Ohio Supreme Court construction of its own statutes, stating "whose interpretations for our purposes, become a part of the statutes."

The principle, so recently followed in these cases, is applicable here. The Colorado Supreme Court in a long line of cases has judicially determined the nature of a mutual ditch or irrigation company, such as Petitioner, under the Colorado laws. So have the Appellate Courts of the other western semiarid States. It is not clear on what theory the Court can entirely ignore the Colorado Supreme Court determination of the Colorado laws as to the nature of a mutual irrigation company organized under those laws when, as recently as one week before the decision was handed down in this case, it affirmed the *Erie v. Tompkins* principle in the above referred to cases.

We again most respectfully ask the Court to give further consideration to this thought.

As held by the Colorado Supreme Court (and the

Courts of the other western semi-arid States); Petitioner is not and cannot be a separate, independent organization, carrying on a business separate from its farmer stockholders. Its stock is merely a muniment of title to the water right which is owned by the stockholders and which stock evidences the stockholders' "interest in the reservoir, canal and water right" as the Colorado Supreme Court has expressly stated in the above quoted language from the *Beatty* case.

Clearly, by the Colorado Supreme Court decisions (and similar decisions in the other western States), Petitioner is engaged in agriculture in behalf of its stockholders and Petitioner's employees are likewise so engaged.

Every moment of his life the farmer in the irrigated West breathes "water." He worries all Winter as to what the water supply will be the coming Spring and Summer. That supply and the time when it is available determines whether he will have a crop and the extent thereof. If his land borders the stream, he may personally divert the water and apply it to the land. If it is distant, he may have one or more helpers. If it is ~~is~~ still farther distant and he is a late comer, as a great majority of the farmers are, he must rely upon carriage through a ditch miles distant from the stream and a reservoir storage right in which water can be impounded in the flush Spring season. As above pointed out, to accomplish this, he has pooled his resources, past, present and future, with others, to secure that water to which he has the right under the State laws to receive through the medium of a mutual ditch company. He must take that water for his crops when it is available in the streams, and it is not always available. It may be one day a week or it may be seven days a week. His crops are thirsty for this water at all hours and on all days of the week. It may be daytime, but it is often nighttime when the water is available and must be taken and applied. The crops cannot recognize any time limit such as a 40-hour week in their absolute need for water, nor can the farmer who is attempting to raise crops.



We are apprehensive that the majority of the Court, distant as the Court is from the irrigated West, does not appreciate, what in the West is a matter of common knowledge, the inside nature of irrigation and the necessity of farmers to carry on that irrigation by whatever means are best suitable therefor, which, in a great many instances, is through the medium of a mutual ditch company. It is significant that the Trial Judge and the Judge who dissented in the Circuit Court of Appeals have lived a lifetime in the irrigated West and, no doubt, because of this close lifetime contact with irrigation, feel and know in their bones just how irrigation is carried on out here and that, whether that irrigation is carried on entirely by the farmer himself, or through immediate employees, or through his mutual irrigation company, an association with other farmers, it is all part and parcel of his agricultural contribution. Here in the West agriculture means irrigation, for all practical purposes, and irrigation means water on the land, and it is immaterial, for practical purposes, how the water gets on the land, just so it gets there.

While it is not a judicial authority, we think the following comment, which we have just received from an attorney for another mutual irrigation company in Colorado who has just read the Court's opinion, well summarizes what we have in mind:

"I think the court wholly misunderstands the situation and does not give weight to the real fact that the only interstate commerce involved is farming or, in the more general sense, agriculture. The vicissitudes of irrigation, the uncertainty of water supply, and all the essential features of irrigation farming have been overlooked.

"The little ditch grown into a large canal and as a protection, storage in reservoirs, and the necessity of conveyance by the convenience of the inter-

mediary corporate entity does not change the true situation.

"Ultimately the farmer himself applies the water as he needs it and he himself produces the goods which go into interstate commerce. He associates others with him, he finds it necessary to finance the transaction by personal borrowings or by bond issues of his representative, the company, but this still leaves it mere agriculture and farming.

"The water or the use of the water is his own. The means of application of the water are still the farmer's, even though he employs labor on his own place and pays it himself or he and his fellow farmer associates join in hiring employees to construct and operate the means of diversion of the water."

The Court in its majority opinion gives a number of examples of what has been held not to constitute agriculture. With these rulings we here have no quarrel. We submit, however, that they are not analogous to the facts shown in the present case. To our "irrigation" minds they are not only not analogous but they are as far different from the situation disclosed in the present case as day is from night.

The Court in its examples given cites the farmers cooperative situation. Clearly, a farmers cooperative or any other cooperative is a business enterprise in itself, even though, on the face of it, it may be a so-called nonprofit corporation. The Court then cites the tool manufacturing company and its employees, the fertilizer company and its employees and similar businesses which may sell materials of one kind or another to a farmer and which are useful to the farmer in his agricultural efforts. These are all examples of separate, independent businesses, as has been held. The employees of such companies, as the employees of power companies which furnish power to the farmers, may be within the general coverage of the Act because they are working in

a process or occupation necessary to the production of goods for commerce, but this does not answer the question as to whether they are themselves employed in agriculture. In the present case Petitioner's employees are engaged in an occupation which is an indivisible and essential part and parcel of irrigation which, in itself, is agriculture. These employees are not engaged in the business of manufacturing something which is sold to the farmers for agricultural purposes, but are engaged in the agriculture itself. Petitioner, as a mutual ditch company, is engaged in no manufacturing business, or any other kind of business separate and independent from the agricultural business of its farmer stockholders. It does not sell anything. It does not buy anything, except maintenance and operating tools and machinery required by the farmers to secure their water. It does not manufacture anything. Yet, as the agency of convenience of its farmer stockholders, it only diverts, carries and delivers to them their own water, the cost of which is defrayed by the stockholders the same as the cost of their plowing, their seeding and their harvesting.

## VI.

### THE DISSENTING OPINION OF MR. JUSTICE JACKSON

Petitioner's employees are held to be subject to the general coverage of the Act because they are engaged in the production of goods for commerce. Admittedly, the only "goods" that these employees are in any way connected with are agricultural goods. These employees do not actually produce the crops. They are held to be engaged in the production of goods for commerce and, hence, within the coverage of the Act only because under Section 3 (j) production of goods for commerce is made to include any employee engaged in "any process or occupation necessary to the production thereof."

We have heretofore urged that, as a matter of reason and logic, if Petitioner's employees can properly be held to

be engaged in the production of goods for commerce; then they must necessarily be engaged in agriculture. To us there seems to be no answer to this conclusion. The force of our contention appealed to the Trial Judge and it appealed to the dissenting Judge in the Court of Appeals, both of whom, as above stated, have had a lifelong contact with agriculture as it is carried on through irrigation in the West and who know what the common concept of agriculture and irrigation in the West is. The merit of our contention now appeals to Mr. Justice Jackson who has, in his dissenting opinion, in his own style, forcefully stated his views and ours. To us the Court's contrary conclusion is entirely illogical. We know from the reaction already evidenced by the farmers who have learned of the Court's opinion that they likewise fail to understand its logic, so, again, we respectfully request the Court to give further thought to the logic of its opinion.

## VII.

**THE COURT HAS CONSTRUED THE WAGE AND HOUR PROVISIONS OF THE ACT SO AS TO IMPOSE A PENALTY UPON THE FARMERS OF THE SEMIARID REGIONS OF THE WEST WHO REQUIRE IRRIGATION FOR THE GROWING OF CROPS AND WHO, BY NECESSITY, MUST IRRIGATE THOSE CROPS THROUGH THE MEDIUM OF THEIR MUTUAL DITCH COMPANIES. WHEN THE PLAIN WORDS OF THE ACT ITSELF SHOW THAT CONGRESS INTENDED TO FAVOR ALL FARMERS AND FREE THEM FROM ALL PENALTIES AND TO EXEMPT ALL EMPLOYERS ENGAGED IN AGRICULTURE AND THEIR EMPLOYEES FROM ALL PENALTIES. EMPLOYMENT IN AGRICULTURE IS THE MOST FAR-REACHING EXEMPTION IN THE ACT. THE JUDGMENT OF THE COURT, AS IT NOW STANDS, AMOUNTS TO JUDICIAL LEGISLATION**



The Congressional intent to exempt agriculture in all its branches from the coverage of the Fair Labor Standards Act is expressly stated in the Act.

The indispensability of irrigation to agriculture in the semiarid States of the West has been recognized by this Court in any number of cases, including *State of Wyoming v. State of Colorado*, et al., 259 U.S. 496, 66 L. Ed. 999, 1019, and *State of Nebraska v. State of Wyoming*, 325 U.S. 589, 89 L. Ed. 1815, 1819, cited and quoted from on pages 11 and 12 of Petitioner's brief.

In this case the Trial Court, the Court of Appeals, both majority and minority, and this Court in its several opinions all recognize that irrigation is necessary to agriculture and that the work performed by Petitioner's employees is necessary to that irrigation. This Court properly states that "necessary" is an understatement of the connection of Petitioner's employees with irrigation, which, in turn, admittedly, is agriculture. We quote Footnote 6 on page 4 of this Court's opinion:

" 'Necessary' understates the case. The water supplied by the company's employees is, in this case, an indispensable prerequisite for agricultural production. Cultivation began only with irrigation and it will end if the irrigation ceases. Under such circumstances, there can be no doubt of the immediacy of the connection between the production, by the farmers, for commerce and the work of the petitioner's field employees in providing water for irrigation."

We submit that not only is the work of Petitioner's employees "an indispensable prerequisite for agricultural production" but, stated in another way, is an integral part and parcel of the irrigation of the crops of the farmer stockholders of Petitioner, without which there can be no irrigation and can be no agriculture.

We quote again from this Court's opinion in *Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 88 L. Ed. 1488, 1493, 1496:

(page 1493)

“.... Congress provided for eleven exemptions from the controlling provisions relating to minimum wages or maximum hours of the Fair Labor Standards Act. *Employment in agriculture is probably the most far-reaching exemption.*....” (emphasis supplied)

(page 1496)

“.... After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.”

We realize that there is the rule commented upon in the opening section of this petition that exemption provisions in the Act should be strictly construed. However, we most seriously question whether any such rule should be applied to the agricultural exemption in the Act, which, according to the express language of Congress, is supposed to cover agriculture in all its branches. This Court has recognized the Congressional intent in stating in the *Addison* case, *supra* that “Employment in agriculture is probably the most far-reaching exemption.”

The declared purpose of the Act (Sections 2 (a) and 2 (b)) was to correct and to eliminate “labor conditions” then existing that were “detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers.”

In order to correct these “detrimental” labor conditions in the industries where they existed, Congress decided to impose upon such industries the penalties found in Sections 6 and 7 of the Act.

Congress was aware of the fact that there were some industries "engaged in commerce or in the production of goods for commerce" where these "detrimental" labor conditions did not exist, and Congress freed such industries from the penalties found in Sections 6 and 7 of the Act by exempting all such industries and the employees of such industries, either in whole or in part (Section 13 (a)). Section 13 (a) (3) exempted "any employee employed as a seaman" and in Section 13 (a) (6) it exempted "any employee employed in agriculture," thereby emphatically and unconditionally completely releasing all employees engaged in these two exemptions; whereas, it only partially and conditionally releases employees in other industries.

There is no warrant in the Act itself to release some employers engaged in agriculture and to penalize other employers engaged in the same processes of agriculture. The penalties imposed by Section 6 and 7 of the Act on those who employ agricultural workers who are held not to be employed in agriculture are considerable and, in addition to the inequality between workers performing the same agricultural work, is a severe drain on the employer in meeting the requirements of time and a half and the penalties that can be recovered for past years, as well as future years; and all such penalties must be paid by the farmer stockholders of Petitioner and by no one else. The Petitioner has no money of its own; it has no means of raising money for the payment of these penalties and all such moneys must be obtained by assessments that the farmer stockholders themselves at stockholders' meetings levy upon themselves to be paid by such farmer stockholders the same as the farmer stockholders, by such assessments, pay off and discharge the mortgage indebtedness that they create against their own properties for the purpose of building and maintaining the system that they operate through their agent, the Petitioner. To impose these penalties upon the Petitioner is a subterfuge and a disregard of the consequences of so doing when it

is very apparent that the penalties must be paid by the farmer stockholder, who, Congress, by the plain wording of the Act, intended to protect and relieve from all burdens that existed in the year when the Act was passed in 1938 and that exist today and that are receiving the favorable consideration of Congress.

The Court says, on page 13:

.... There is a difference between the hiring of mutual servants by a group of employers and the creation by them of a separate business organization, with its own officers, property, and bonded indebtedness, which in turn hires working men. ....

The creation of this difference between workmen who work for individuals or a collective group of farmers and those who do the same work for those same farmers through the agency of a mutual ditch company amounts to judicial legislation, for this distinction is not warranted in any words found in the Act.

We conclude this petition with the thought that, whether a liberal rule of construction or a strict rule of construction be applied in the present case, Petitioner's employees are employed in agriculture within the meaning of the Act.

Dated July, 1949

Respectfully submitted,

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I, JOHN P. AKOLT, of Denver, Colorado, do hereby certify that I am one of the attorneys for The Farmers Reservoir and Irrigation Company, Petitioner in the above petition named, and assisted in the preparation of the petition. I further certify that said petition is presented in good faith and not for delay.

JOHN P. AKOLT.